TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 188

ALBERT E. McKENZIE, AS TRUSTEE IN BANKRUPTCY OF GRAVES-QUINN CORPORATION, PETITIONER,

vs.

IRVING TRUST COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR CERTIORARI FILED JUNE 23, 1944.

CERTIORARI GRANTED OCTOBER 9, 1944.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

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INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 24, 1944

[fol. 1] **IN COURT OF APPEALS OF NEW YORK**

ALBERT E. MCKENZIE, as Trustee in Bankruptcy of GRAVES-QUINN CORPORATION, Plaintiff-Appellant,

against

IRVING TRUST COMPANY, Defendant-Respondent

STATEMENT UNDER RULE 234

This action was commenced by the service of a summons and complaint on November 24, 1941. Issue was joined by the service of the amended answer of defendant on January 2, 1942.

The names of the original parties are given in full above.

The attorneys for plaintiff are M. Carl Levine, Morgulas & Foreman.

The attorney for defendant is Paul E. Mead.

There has been no change of parties or attorneys herein.

[fol. 2] IN SUPREME COURT OF NEW YORK, NEW YORK COUNTY

[Title omitted]

NOTICE OF APPEAL TO APPELLATE DIVISION

SIRS:

Please take notice that the above named defendant hereby appeals to the Appellate Division of the Supreme Court, First Department, from the order made in the above entitled action and entered in the Office of the Clerk of the County of New York on the 5th day of December, 1942, denying the motion of defendant to dismiss the first cause of action set forth in the complaint, and the appeal is taken from the whole and from each and every part of said order.

Dated: New York, December 15, 1942.

Yours, etc., Paul E. Mead, Attorney for Defendant, Office & P. O. Address, One Wall Street, Borough of Manhattan, City of New York.

To: M. Carl Levine, Morgulas & Foreman, Esqs., Attorneys for Plaintiff.

The Clerk of the County of New York.

[fol. 3] IN SUPREME COURT OF NEW YORK, COUNTY OF NEW YORK

Special Term, Part 1

Index Number 7149—Year 1942

ALBERT E. McKENZIE, as Trustee in Bankruptcy of GRAVES-QUINN CORPORATION, Plaintiff,

against

IRVING TRUST COMPANY, Defendant

Present: Hon. William T. Collins, Justice.

ORDER APPEALED FROM

The following papers numbered 1 to 32 read on this motion, argued Dec. Res. this 30th day of October, 1942, Calendar No. 68.

	Papers Numbered
Notice of Motion and Affidavits Annexed Exhibits	1-17
Answering Affidavits Exhibits	18-22
Replying Affidavit	23
Surrebuttal Affidavits Exhibits	24-25
Exhibits Photostatic copies of exhibits	26-32

[fol. 4] Upon the foregoing papers this motion by the defendant to dismiss the first cause of action is denied. (See memo filed herewith.)

Enter,

W. T. C.,
J. S. C.

Opinion filed herewith.
Dated December 4th, 1942.
Briefs: Plaintiff's A(2) Defendant's A(2).

IN SUPREME COURT OF NEW YORK, NEW YORK COUNTY

[Title omitted]

NOTICE OF MOTION TO DISMISS

SIRS:

Please take notice that on the complaint; the amended answer thereto, the annexed affidavits of Orvil E. Miles and William A. Onderdonk, each verified the 14th day of August, 1942, and upon all the other papers and proceedings herein, [fol. 5] the undersigned will apply to this court at a Special Term, Part I thereof, to be held at the County Court House, Borough of Manhattan, City of New York, on the 11th day of September, 1942, at the opening of court on that day or as soon thereafter as counsel can be heard, for judgment in favor of defendant dismissing the first cause of action of the complaint upon the ground that the defenses thereto are sufficient as matter of law and founded upon facts established by documentary evidence or official record, and for such other and further relief as to the court may seem proper.

All answering affidavits must be served at least five days before the return day of this motion.

Dated: August 25, 1942.

Yours, etc., Paul E. Mead, Attorney for Defendant, Office & P. O. Address, One Wall Street, New York, New York.

To: M. Carl Levine, Morgulas & Foreman, Esqs., Attorneys for Plaintiff.

[fol. 6] IN SUPREME COURT OF NEW YORK

AFFIDAVIT OF ORVIL E. MILES, READ IN SUPPORT OF MOTION

[Same title]

STATE OF NEW YORK,
County of New York, ss.:

ORVIL E. MILES, being duly sworn, says:

I am an Assistant Secretary of Irving Trust Company, defendant herein, and have held such position at all the times hereinafter mentioned.

During the months of October, November and December, 1940, and for some time prior and subsequent thereto I was located at the Lincoln Office of defendant where Graves-Quinn Corporation, the bankrupt herein, maintained and had for many years maintained an account.

My duties were those of a lending officer; in which capacity I came in contact with Graves-Quinn upon the occasions herein mentioned. On October 10, 1940 Graves-Quinn obtained from defendant, acting through deponent, the first of a series of advances to finance its operations under a certain contract with the War Department No. W 6101 qm-131, dated September 14, 1940. Attached hereto, marked Exhibit A and made a part hereof is a photostatic copy of the loan and discount ledger of defendant showing all the loan transactions with Graves-Quinn for the period covered and evidenced by promissory notes. There were at times advances in the form of overdrafts on the checking account of Graves-Quinn.

The only overdrafts of significance on this motion are those occurring immediately prior to November 28, 1940. At the opening of business on November 20, 1940 there was [fol. 7] to the credit of Graves-Quinn's checking account $45,347.46. As of the close of business on that day and the succeeding business days the checking account of Graves-Quinn was overdrawn as follows:

November 20, 1940	$ 4,622.00
November 21 (Thanksgiving Day)	
November 22	15,345.93
November 23	18,838.16
November 24 (Sunday)	
November 25	33,045.20
November 26	40,704.00
November 27	40,812.00
November 28	13,867.47

On November 20, 1940 Graves-Quinn Corporation executed an assignment to defendant of all moneys due and to become due to it under the War Department contract above mentioned. A photostatic copy thereof, marked Exhibit B, is annexed hereto and made a part hereof. The assignment was prepared by defendant and mailed to Graves-Quinn on November 18, 1940, accompanied by a letter, a copy of which, marked Exhibit C, is annexed hereto and made a

part hereof. Like the other annexed letters signed by deponent, defendant's letterhead does not appear in the copies. The assignment, duly executed, was received by deponent on behalf of defendant on November 22, 1940. The purpose of the assignment was to secure defendant for the advances made and to be made. Attached hereto, marked Exhibit D, is a copy of letter written by Graves-Quinn to defendant, dated March 19, 1941. The request of Graves-Quinn was at once complied with. Attached hereto, marked Exhibit E, is copy of letter, dated March 20, 1941, sent to [fol. 8] Graves-Quinn. On November 27, 1940, one copy of the assignment was dispatched to the Quartermaster General with a letter, a copy of which, marked Exhibit F, is annexed hereto and made a part hereof.

On December 2, 1940, a letter was sent to Standard Accident Insurance Company, surety on the payment and performance bonds written in connection with the said contract, a copy of which, marked Exhibit G, is annexed hereto and made a part hereof. On the same date similar letters were sent to the General Accounting Office, Washington, and to the Disbursing Officer, United States Army Base, Boston, Massachusetts. In each instance a true copy of the assignment accompanied the letter. Also the Contracting Officer was notified of the assignment and furnished with a copy thereof.

On December 5, 1940 the consent of the Secretary of War to the assignment was issued and delivered to defendant. A copy thereof, marked Exhibit H, is annexed hereto and made a part hereof. Attached hereto, marked Exhibit J, and made a part hereof, is copy of a memorandum on behalf of the Quartermaster General to the Assistant Secretary of War recommending that the assignment be approved.

On December 6, 1940 copies of the consent of the Secretary of War were mailed to each of the persons to whom notice of the assignment had been given.

On November 27, 1940 the government issued and delivered to Graves-Quinn Corporation in Boston a check for $155,865.50 pursuant to the contract aforesaid. On that day and after the said check had been received by Lewis W. Graves, Treasurer of Graves-Quinn, I talked by telephone [fol. 9] with Mr. Graves, who told me that the check was being mailed to defendant. This was in accord with my wishes. On the following day, which was November 28,

1940, defendant received the check duly endorsed in an envelope which bore a postmark "10 P. M." under date of November 27, 1940. In a memorandum made by me on November 28 for the Graves-Quinn file, there is this reference to the check and its mailing:

> "Although Mr. Graves informed us by telephone at 4:45 yesterday afternoon that the government check had been received and would be mailed shortly thereafter, the check had not arrived in this morning's mail. The Graves-Quinn office in New York was in receipt of a letter from Mr. Graves written yesterday evening stating that the check had been mailed to us. • • • About 2 o'clock the check arrived. The envelope bore Boston postmark '10 P. M.' yesterday."

Along with the government check defendant received from Graves-Quinn its check for $150,000, dated November 27, 1940, payable to the order of defendant, a photostatic copy of which, marked Exhibit K, is annexed hereto and made a part hereof. On November 28, the account of Graves-Quinn was credited the amount of the said check for $155,865.50 and the check was collected in due course. On November 28, 1940 also the account of Graves-Quinn was debited the amount of the check for $150,000. The entries made on November 28, 1940 reflect, in form at least, discharge of the obligations of Graves-Quinn to defendant in the amount [fol. 10] of $150,000. The entire payment came out of the government remittance of $155,865.50. What occurred on November 28, 1940 was the consummation of the prior issuance and delivery of the checks referred to and the still earlier assignment by Graves-Quinn Corporation whereby the right to the payment evidenced by the government check had been transferred to defendant. It is the issuance of the $150,000 check to defendant by Graves-Quinn of which plaintiff complains in this action.

One of the notes retired on November 28, 1940 was for $50,000, payable by its terms on December 9, 1940. Anticipation of this note is a circumstance of no consequence whatever. When the advances to Graves-Quinn were negotiated in connection with the contract referred to, it was part of the arrangement that advances should be repaid as and when payment were received by Graves-Quinn from the government. As appears from Exhibit A only three

notes were on a time basis and all three, of which the said note for $50,000 was the last, were paid in advance of the maturity dates.

All the payments becoming due from the government to Graves-Quinn subsequent to the aforesaid payment of $155,865.50 made on November 27, 1940, and until the contract was completed were made directly by the government to defendant as assignee. The basis for the diversion of payments from Graves-Quinn to defendant was the assignment heretofore referred to and marked Exhibit B. There was no other instrument of assignment.

That Graves-Quinn, when it made the assignment to defendant, had exhausted its authority to assign is evident [fol. 11] from the letter of the Finance Officer, U. S. Army, a copy of which, marked Exhibit L, is annexed hereto and made a part hereof.

Wherefore, deponent respectfully asks that defendant have judgment dismissing the first cause of action upon the ground that the right of defendant to the payment out of the avails of the contract under which it had the assignment became fixed outside the four months' period to which the plaintiff is limited in attacking payments as preferential under the Bankruptcy Act.

Orvil E. Miles.

(Sworn to before Adam N. Keppler, August 14, 1942.)

[fol. 12] EXHIBIT A, ANNEXED TO AFFIDAVIT OF ORVIL E. MILES, READ IN SUPPORT OF MOTION

(Opposite page)

(Here follow 2 photolithographs, side folios 13, 13a)

CUSTOMERS LIABILITY—LOANS AND DISCOUNTS

Guaranteed By _____ Amount $ _____

Guaranteed By _____ Amount $ _____

General Collateral Agreement on file dated _____ 193__

Name _____

Address _____

Business _____

Affiliations _____

DATE 193...	OTHER MAKER OR ENDORSER	RATE	DUE	DEBITS	CREDITS	BALANCES OWN UNSECURED NOTES	BALANCES OWN COLLATERAL NOTES	BALANCES NOTES RECEIVABLE DISCOUNTED
7/19	[illegible]	[illegible]	8/18	20000		20000		
[illegible]	[illegible]	[illegible]	[illegible]	20000		40000		
[illegible]	[illegible]	[illegible]	[illegible]	5000		45000		
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	20000	47500		
[illegible]	[illegible]	5	9/17	20000	[illegible]	35000		
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	5000	30000		
[illegible]	[illegible]	[illegible]	10/17	20000	30000	20000		
[illegible]	[illegible]	[illegible]	11/17	15000	20000	15000		
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	15000	01		
[illegible]	[illegible]	[illegible]	[illegible]	15000	[illegible]	15000		
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	0		
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	15000	20000		
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	0		
[illegible]	[illegible]	[illegible]	9/16	10000	[illegible]	10000		
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	10000	0		
[illegible]	[illegible]	[illegible]	[illegible]	3000	[illegible]	3000		
[illegible]	[illegible]	[illegible]	[illegible]	40000	[illegible]	70000		
[illegible]	[illegible]	[illegible]	Demand	35000	70000	35000		
[illegible]	[illegible]	[illegible]	1/4	50000	[illegible]	85000		
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	35000	50000		
[illegible]	[illegible]	[illegible]	Demand	30000	[illegible]	80000		
[illegible]	[illegible]	[illegible]	[illegible]	30000	[illegible]	110000		
[illegible]	[illegible]	[illegible]	[illegible]	40000	[illegible]	150000		
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	150000	0		
[illegible]	[illegible]	[illegible]	[illegible]	82000	[illegible]	82000		

CUSTOMERS LIABILITY - LOANS AND DISCOUNTS

GUARANTEED BY — AMOUNT $

GUARANTEED BY — AMOUNT $

GENERAL COLLATERAL AGREEMENT ON FILE DATED — 19

NAME

ADDRESS

BUSINESS

AFFILIATION

DATE 19	OTHER MAKER OR ENDORSER	RATE	DUE	DEBITS	CREDITS	BALANCES — OWN UNSECURED NOTE	BALANCES — OWN COLLATERAL NOTE	BALANCES — NOTES RECEIVABLE DISCOUNTED

13a

[fol. 14] EXHIBIT B, ANNEXED TO AFFIDAVIT OF ORVIL E. MILES, READ IN SUPPORT OF MOTION

Assignment by Graves-Quinn Corporation of Rights Under War Department Contract No. W 6101 qm-131 for the Construction and Completion of Temporary Housing at the Harbor Defenses of Boston, Narragansett Bay, Portland and Newport.

Know all men by these presents, that Graves-Quinn Corporation, a corporation duly organized and existing under and by virtue of the laws of the State of New York, with its principal office at Grand Central Terminal Bldg., New York, N. Y. (hereinafter called the "Assignor"), in consideration of $1.00 lawful money of the United States to it paid before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, has sold, assigned, transferred and set over, and by these presents does sell, assign, transfer and set over unto Irving Trust Company, whose principal office is at One Wall Street, New York, N. Y. (hereinafter called the "Assignee"), to its own proper use and benefit, all the right, title and interest of the Assignor in and to any and all sums of money now due or to become due under War Department Contract No. W 6101 qm-131.

The Assignor represents that said Contract is an existing Contract, binding on both the Assignor and the United States Government, that it is not subject to any defense, set-off or counter-claim, and that the full contract price is $1,008,800.00, of which an aggregate of not les than $831,677.06 remains unpaid and payable upon due performance of the Contract.

[fol. 15] The Assignor gives the Assignee full power and authority for its own use and benefit to ask, demand, collect, receive and give acquittance for such sums or any part thereof, and in the Assignor's name or otherwise to prosecute or withdraw any suits or proceedings at law or in equity therefor.

The Assignor will at all times hereafter at the request of the Assignee make, do and execute all such further and other acts and deeds as shall be reasonably required to enable the Assignor to collect all sums due or to become due under said Contract according to the intent and purpose of this instrument.

In Witness Whereof, the Assignor has duly caused this instrument to be executed and its seal to be hereunto affixed this 20 day of Nov., 1940.

Graves-Quinn Corporation. By Wm. T. Quinn, President. (Seal.)

Attest:
Lewis W. Graves, Secretary.

[fol. 16] COMMONWEALTH OF MASSACHUSETTS,
County of Suffolk, ss:

On the 20th day of November, 1940, before me personally came Wm. T. Quinn, to me known, who being by me duly sworn, did depose and say that he resides in Cranford, N. J.; that he is the President of Graves-Quinn Corporation, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

Louis I. Fleischman, Notary Public.

[fol. 17] EXHIBIT C, ANNEXED TO AFFIDAVIT OF ORVIL E. MILES, READ IN SUPPORT OF MOTION

November 18, 1940.

Mr. Lewis W. Graves, Secretary & Treasurer
Graves-Quinn Corporation,
77 Summer Street,
Boston, Massachusetts

Dear Mr. Graves:

In accordance with our recent conversation, we enclose in six counterparts, an assignment in our favor of your corporation's rights under War Department Contract No. W 6101 qm-131.

You will note that in the second paragraph there are spaces in which should be entered the full contract price and also the unpaid balance.

One copy of the assignment should be retained for your records and the original and four copies forwarded to us. The extra four copies need to be filed with (1) the General Accounting Office of the Government, (2) the Government Contracting Officer, (3) the surety company, and (4) the Government Disbursing Officer. Since the contract was entered into prior to October 9, 1940, it will be necessary that the assignment be consented to by the Secretary of War or his duly authorized representative.

Very truly yours, Orvil E. Miles, Assistant Secretary.

[fol. 18] EXHIBIT D, ANNEXED TO AFFIDAVIT OF ORVIL E. MILES, READ IN SUPPORT OF MOTION

Graves-Quinn Corporation
General Contractors
Grand Central Terminal
New York

Wm. T. Quinn, Pres. Lewis W. Graves, Sec. & Treas.

March 19, 1941.

Irving Trust Company,
Park Ave. & 42nd Street,
New York, New York

Attention: Mr. O. Miles

GENTLEMEN:

All loans from the bank to us being fully paid, we request that a release of the assignment of payments on the Government contract for the Temporary Housing, Harbor Defenses, New England be executed and forwarded to the Finance Department in Boston.

Your early attention and action will be appreciated.

Yours very truly, Graves-Quinn Corporation, Lewis W. Graves.

LWG:MM.

[fol. 19] EXHIBIT E, ANNEXED TO AFFIDAVITS OF ORVIL E. MILES, READ IN SUPPORT OF MOTION

March 20, 1941.

Mr. Lewis B. Graves, Treasurer, Graves-Quinn Corporation, Grand Central Terminal, New York, N. Y.

DEAR MR. GRAVES:

In response to your letter of March 19, we have executed a release of the assignment of payments due under War Department Contract No. w6101 qm-131.

Copies of this release have been mailed to each of the parties notified of the assignment. An additional copy is attached for your records.

Very truly yours, Orvil E. Miles, Assistant Secretary.

OEM:FM.

[fol. 20] EXHIBIT F, ANNEXED TO AFFIDAVIT OF ORVIL E. MILES, READ IN SUPPORT OF MOTION

November 27, 1940.

Quartermaster General George E. Hartmann, United States Army, Washington, D. C.

DEAR SIR:

Re: War Department Contract No. W 6101 qm-131, for the construction and completion of temporary housing at the harbor Defenses of Boston, Narragansett Bay, Portland and Newport.

Graves-Quinn Corporation

We enclose an assignment in our favor by Graves-Quinn Corp., dated November 20, 1940, of all sums of money now due or to become due under the above described contract.

As this contract was entered into prior to the date of approval of the Assignment of Claims Act of 1940, we are writing to request the approval of the Head of the Department concerned and should appreciate your cooperation in obtaining this approval. The enclosed copy of the assignment is for your records as Contracting Officer.

We assume that the approval of the Head of the Department is given by letter and consequently have not enclosed the other copies of the assignment. In the event, however, that they require some notation by the Department Head, we shall forward them for that purpose.

Respectfully yours, Orvil E. Miles, Assistant Secretary.

[fol. 21] EXHIBIT G, ANNEXED TO AFFIDAVIT OF ORVIL E. MILES, READ IN SUPPORT OF MOTION

December 2, 1940.

Standard Accident Insurance Co., 111 John Street, New York, N. Y.

Attention: Mr. Clarence Glenn

DEAR SIRS:

Re: War Department Contract No. W 6101 qm-131, Assignment by Graves-Quinn Corporation to Irving Trust Company.

We hereby notify you that on November 20, 1940, the Graves-Quinn Corporation assigned all monies due or to become due under the above mentioned contract to Irving Trust Company. A true copy of the instrument of assignment is enclosed, herewith, to be filed in your office.

As this contract was entered into prior to the date of approval of the Assignment of Claims Act of 1940, the consent of the Head of the War Department is required. For your information a copy of this assignment was forwarded to George E. Hartmann, Quartermaster General, on November 27, requesting the required consent.

Very truly yours, Orvil E. Miles, Assistant Secretary.

[fol. 22] EXHIBIT H, ANNEXED TO AFFIDAVIT OF ORVIL E. MILES, READ IN SUPPORT OF MOTION

War Department

Office of the Assistant Secretary

Washington, D. C.

December 5, 1940.

Consent of the Secretary of War to the Assignment of Moneys Due or to Become Due Under a War Department Contract Entered into Prior to October 9, 1940.

The Secretary of War hereby gives his consent to the Graves-Quinn Corporation, of New York, N. Y., contractor under War Department Contract No. W 6101 qm-131, dated September 14, 1940, to assign to a bank, trust company, or other financing institution, including any Federal lending agency, all moneys due or to become due under such contract and not already paid; Provided, however, that such assigned claim or claims shall be subordinate to any claims of the United States Government on account of advance payments heretofore or hereafter made by the Government to the Contractor for the purpose of financing such contract and subordinate also to any other claims against the Contractor that the Government or any agency or instrumentality thereof may at any time have, whether arising out of said contract or otherwise, and *Provided further*, that the assignment and any action taken thereunder shall [fol. 23] conform in all respects to the provisions of the Assignment of Claims Act of 1940.

By direction of the Secretary of War:

Robert P. Patterson, The Assistant Secretary of War.

Note: The assignee should file with the General Accounting Office, the contracting officer, the surety or sureties on the bond, and the disbursing officer designated in such contract to make payments, a true copy of this consent in connection with the true copy of the assignment as required by the Assignment of Claims Act of 1940.

The Assignee will not divulge any information concerning the contract, or contained therein, except to those persons necessarily concerned with the transaction.

[fol. 24] EXHIBIT J, ANNEXED TO AFFIDAVIT OF ORVIL E. MILES, READ IN SUPPORT OF MOTION

December 4, 1940.

Memorandum to: The Assistant Secretary of War.

Subject: Request for Approval of Assignment of Contract Claim.

1. Contract No. W 6101 qm-131, dated September 14, 1940, by and between The United States of America and Graves-Quinn Corporation for the construction and completion of temporary housing in Massachusetts and Rhode Island, was entered into prior to October 9, 1940, the date of approval of the Assignment of Claims Act of 1940. Subdivision 1 of the Assignment of Claims Act of 1940 provides:

> "1. That in the case of any contract entered into prior to the date of approval of the Assignment of Claims Act of 1940, no claim shall be assigned without the consent of the head of the department or agency concerned."

2. It is the opinion of this office that the attached assignment has been executed pursuant to and in accordance with the Assignment of Claims Act of 1940 and, therefore, constitutes a valid assignment.

3. It is recommended that the attached assignment be approved by you in accordance with the provisions of sub-
[fol. 25] division 1 of the Assignment of Claims Act of 1940.

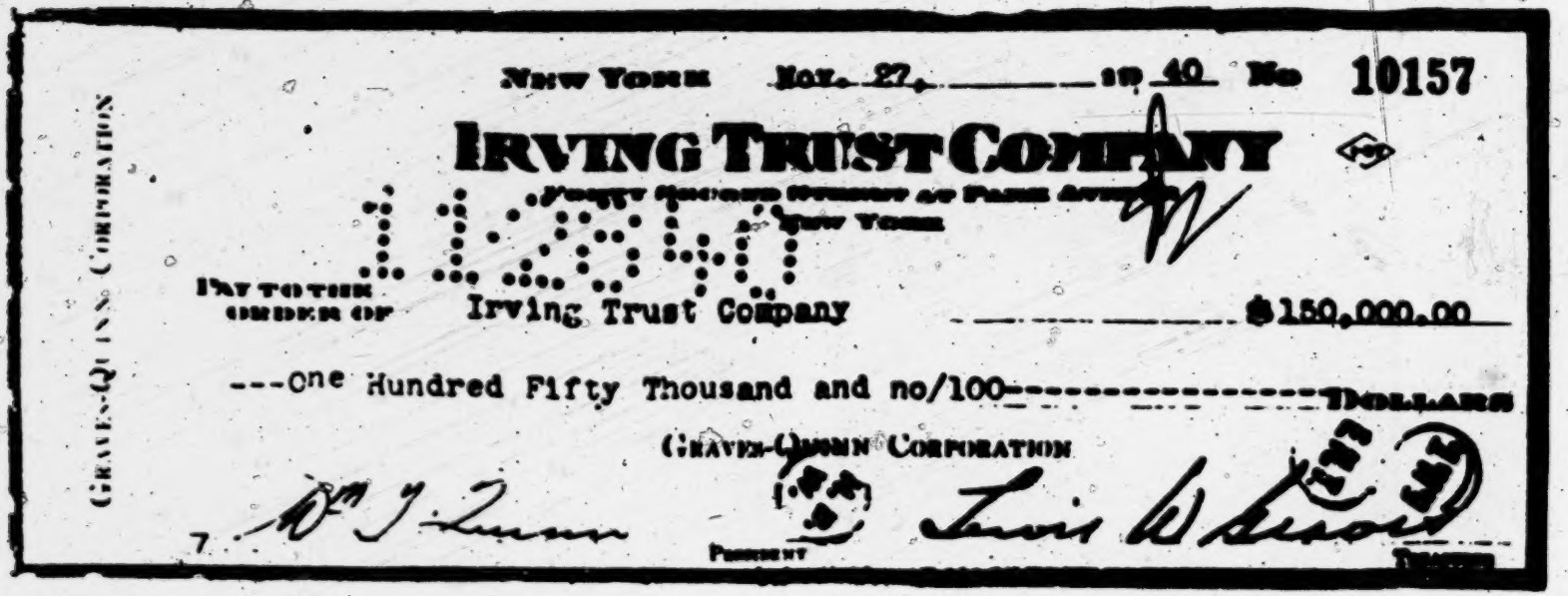
For The Quartermaster General:
C. D. Hartman, Brigadier General, Q. M. C. Assistant. By M. B. Birdseye, Lt. Col., Q. M. Corps., Assistant.

1 Inclosure: Assignment of Claims, 11/20/40.

[fol. 26] EXHIBIT K, ANNEXED TO AFFIDAVIT OF ORVIL E. MILES, READ IN SUPPORT OF MOTION

(Opposite page)

(Here follows 1 photolithograph, side folio 27)



NEW YORK Nov. 27, 1940 No 10157

IRVING TRUST COMPANY

NEW YORK

PAY TO THE ORDER OF Irving Trust Company $150,000.00

---One Hundred Fifty Thousand and no/100---------- DOLLARS

GRAVES-QUINN CORPORATION

GRAVES-QUINN CORPORATION

PRESIDENT

TREASURER

GRAVES-QUINN CORPORATION

27

[fol. 28] EXHIBIT L, ANNEXED TO AFFIDAVIT OF ORVIL E. MILES, READ IN SUPPORT OF MOTION

Finance Department, U. S. Army, Office of Finance Officer, U. S. Army, Army Base, Boston, Mass.

ISW/gba.

In reply refer to: FO 158 (Irving Trust Company)

March 21, 1941.

To Irving Trust Company, 42nd Street at Park Avenue, New York, N. Y.

Attention: Orvil E. Miles, Assistant Secretary

Re: Contract No. W 6101 qm-131 Graves Quinn Corp.

DEAR SIRS:

Receipt is acknowledged of your letter of March 20, 1941, and the release of assignment inclosed therein. It is the view of this office that the Assignment of Claims Act of 1940 contemplated the assignment of *all* money due under a contract, and that until the termination thereof, payments must be made to the assignee. On that basis, the release of assignment is returned.

It is noted that the receipted copies of the notice of assignment from the Standard Accident Insurance Company have not been forwarded to this office, and inquiry is made if same have been received by you. There are sev- [fol. 29] eral accounts now in this office but payment thereof cannot be made until the notices referred to are at hand.

Upon their receipt, payment will be made to you as assignee, as heretofore.

Very truly yours, Finance Officer, U. S. Army, I. S. Werman, Captain, F. D., Assistant.

1 Incl.

In Supreme Court of New York

Affidavit of William A. Onderdonk, Read in Support of Motion

[Same Title]

State of New York,
County of New York, ss:

William A. Onderdonk, being duly sworn, says:

I am an attorney associated with Paul E. Mead, attorney for defendant herein and in immediate charge of this action for defendant. The action was commenced by the service of a summons and complaint on November 24, 1941. The complaint contains two causes of action, both brought to recover the identical sum of $150,000 with interest from November 28, 1940, which principal sum was received by defendant from Graves-Quinn in discharge of obligations in said amount of Graves-Quinn to defendant. The claim is that payment was preferential. The first [fol. 30] cause of action is based on the Bankruptcy Act, and the second on Section 15 of the Stock Corporation Law. The necessary allegations of the insolvency of Graves-Quinn, knowledge on the part of defendant, and the insufficiency of the assets to pay in full the liabilities of the bankrupt and preferential intent are set forth.

The amended answer of defendant was served on January 2, 1942. This answer denies the material allegations upon which liability is predicated and in addition sets up three separate defenses.

The first defense alleges the execution of a contract by Graves-Quinn and the War Department for the construction by Graves-Quinn of certain housing projects in New England for a stated consideration of $1,008,800; that Graves-Quinn applied to defendant for assistance in financing the construction; that commencing on October 10, 1940 defendant from time to time loaned money to Graves-Quinn, evidenced by promissory notes, upon the promise of Graves-Quinn that all notes outstanding at any of the times when payments were received by it from the United States should be fully paid without regard to the maturity dates of the notes; that on November 27, 1940 Graves-Quinn received from the United States for work done pursuant to the said contract payment by check in the sum of $155,-

865.50; that the check, duly endorsed, was delivered to defendant on November 27, 1940 and credited to the Graves-Quinn account on November 28, 1940, on which date defendant held four promissory notes of Graves-Quinn aggregating the face amount of $150,000, three of which were payable on demand and one note for $50,000 by its terms [fol. 31] payable on December 9, 1940; that the said note for $50,000 was properly payable at the time Graves-Quinn received the said payment of $155,865.50 from the United States by reason of the agreement underlying the advances made by defendant; that on and after November 27, 1940 defendant had a lien and right of offset against the deposit balance of Graves-Quinn to the amount of $150,000; that on November 27, 1940 Graves-Quinn issued and delivered to defendant its check for $150,000 on its said account by reason of which the account was on November 28, 1940 debited in said amount and the liability of Graves-Quinn on the aforesaid notes fully discharged; that the said transaction is the transfer and payment of which plaintiff complains and that the delivery and credit of the check for $155,865.50 and the payment of the notes were in the normal and regular course of business as it had been carried on between Graves-Quinn and defendant prior thereto, and as such business continued to be carried on thereafter, whereby outstanding notes were retired as Graves-Quinn received payment from the United States pursuant to its said contract and new advances were made by defendant in anticipation of further payments to be received from the United States.

The second defense, after repeating the allegations of the first defense relative to the contract, and the arrangement for financing between Graves-Quinn and defendant, alleges further that on or about November 20, 1940 Graves-Quinn, for a valuable consideration, executed and delivered to defendant as security to all existing and future loans made by defendant, an assignment of its right, title and interest in and to all sums of money then due or thereafter [fol. 32] to become due under said contract; that the said assignment was duly approved by the Secretary of War and written notice thereof, together with true copies of the instrument of assignment, were duly filed with the several offices prescribed in the Assignment of Claims Act of 1940; that as of November 18, 1940 there was payable to

Graves-Quinn under the said contract the sum of $155,865.50 and thereafter and prior to November 28, 1940 a check in said amount in favor of Graves-Quinn was issued and delivered to said corporation, which corporation, by reason of the said assignment, received said check as the property of defendant; that on November 27, 1940 said check for $155,865.50, duly endorsed, was delivered to defendant and by it received in both due and normal course of business and as assignee, and out of the avails thereof defendant received the sum of $150,000 in discharge of the outstanding obligations of Graves-Quinn then due and payable, and that said payment is the payment and transfer referred to in the complaint.

The third defense is partial and alleges in short that of the sum of $150,000 advanced by defendant to Graves-Quinn repayment of which plaintiff challenges, $40,000 was advanced after the date of the said assignment.

The motion pending is addressed to the first cause of action only and rests on the contention that the rights of the defendant in and to the payments complained of were determined by events preceding November 28, 1940, and that, being outside the statutory period of four months by which plaintiff is limited, are immune to attack.

One of the reliances of defendant on its motion is the assignment executed by Graves-Quinn shortly after the [fol. 33] adoption of the Assignment of Claims Act of 1940, which was designed to enable contractors holding government contracts to finance performance thereunder. While the legal aspects of the matter will be discussed in a brief, deponent refers here to Volume 86, Part 11, Page 12,557 of the Congressional Record for an explanation of the purposes of the statutory provision requiring the consent of the Department Head to the assignment of contracts entered into prior to the adoption of the Assignment of Claims Act of 1940 The debate includes the following explanation:

> "Mr. Youngdahl. Does the gentleman feel that the provision in this bill requiring the consent of the agency making the contract will in any way act as a deterrent to the purpose for which this bill is being passed?
>
> "Mr. Summers of Texas. May I make this explanation to the gentleman who introduced the first bill covering these matters? If this bill is not enacted

there can be no assignment of claims. That is the first proposition. The agencies of the Government which have responsibility are themselves responsible for proposing this legislation. They came down to the Committee on the Judiciary, as the gentleman from Michigan explained, and indicated their desire to increase as far as possible the number of persons who could bid on these contracts, and who could help the Government in this emergency. They said, however, with reference particularly to some of the equipment material, with regard to which secrecy had to be preserved, [fol. 34] that they did not want to take the responsibility of advising that in every case these claims should be assignable, or that there would not be in the nature of things some claims that should not be assigned. As the gentleman from Michigan (Mr. Michener) has fully explained, the committee after full consideration agreed that it would not like to take the responsibility of trying to override the expressed judgment of those who are themselves in responsibility with regard to the whole program."

The statute provided that in the case of any contract entered into after the adoption thereof a stipulation therein forbidding assignment would preclude assignment. This provision as to subsequent contracts, together with the requirements of the consent as to prior contracts, served to prevent the assignment of any contract which the Government authorities did not want assigned.

This suit involves the question whether in large part the losses incident to the failure of Graves-Quinn are to be borne by the Standard Accident Insurance Company, which wrote the payment and performance bonds pursuant to which it was liable to pay the laborers and materialmen on the job, or by the defendant who, after the War Department contract No. W6101 qm-131 between the Government and Graves-Quinn had been executed and the bonds had been written, financed the work to completion. The surety instigated the bankruptcy proceedings and if these proceedings had any other purpose than the pending suit against defendant in this action that purpose has not been disclosed. [fol. 35] This fact is without legal significance on the very limited ground upon which the first cause of action is being

attacked, and is only mentioned to preclude any assumption that Irving Trust Company was paid at the expense of the workmen and materialmen employed by Graves-Quinn in connection with the aforesaid contract. To the extent they were not paid out of the advances made by defendant they have been largely, if not wholly, paid by the surety.

Wm. A. Onderdonk.

(Sworn to before Adam H. Keppler, August 14, 1942.)

In Supreme Court of New York

Complaint, Read in Support of Motion

[Same Title]

Albert E. McKenzie, as Trustee in Bankruptcy of Graves-Quinn Corporation, by M. Carl Levine, Morgulas & Foreman, his attorneys, alleges as follows:

As and for a First Cause of Action:

1. That on March 28th, 1941, in the United States District Court for the Southern District of New York, a petition in involuntary bankruptcy was filed against the Graves-Quinn Corporation (hereinafter referred to as the "bankrupt"), praying that it be adjudged bankrupt, and thereafter and on June 19th, 1941, it was duly adjudicated bankrupt in such Court.

[fol. 36] 2. Upon information and belief, that the defendant at all times hereinafter mentioned was, and still is, a domestic corporation.

3. That thereafter and at a special meeting of the creditors of said bankrupt, certain of which creditors were in existence at the time of preferential payment hereinafter more particularly complained of, duly called and held by Hon. Peter B. Olney, Referee in Bankruptcy, in charge of said proceedings, the plaintiff herein on the 14th day of July, 1941, was duly appointed Trustee in Bankruptcy, and duly qualified and is now acting as such Trustee.

4. Upon information and belief, that within four months before filing of the aforesaid involuntary petition in bankruptcy against said bankrupt, while insolvent, and indebted to the defendant, and other creditors of the same class upon unsecured indebtedness provable in bankruptcy, the said bankrupt made a transfer of a portion of its property to the defendant by making payments to it on or about November 28th, 1940, in the amount of $150,000.00 for or on account of said antecedent debt.

5. Upon information and belief, the effect of such payment by the bankrupt to the defendant was to enable said defendant to obtain a greater percentage of its debt than some other creditor of the said bankrupt of the same class as defendant, and that said payment did thus operate as a preference under the provisions of the Bankruptcy Act of 1898, and the Amendments thereto.

[fol. 37] 6. Upon information and belief, that the said defendant had at the time when said transfer and payment was made reasonable cause to believe that said bankrupt was insolvent within the purview of the aforesaid Bankruptcy Act.

7. That the plaintiff has insufficient assets in its hands to pay in full the liabilities of the bankrupt.

8. That the plaintiff has duly demanded of the defendant the restitution and return of said preferential payment, but same has been refused.

As and For a Second Cause of Action:

9. Upon information and belief, that the defendant at all times hereinafter mentioned was, and still is, a domestic corporation.

10. That on March 28th, 1941, in the United States District Court for the Southern District of New York, a petition in involuntary bankruptcy was filed against the Graves-Quinn Corporation (hereinafter referred to as the "bankrupt"), praying that it be adjudged bankrupt, and thereafter and on June 19th, 1941, it was duly adjudicated bankrupt in such Court.

11. That thereafter and at a special meeting of the creditors of said bankrupt, certain of which creditors were in

existence at the time of preferential payment hereinafter more particularly complained of, duly called and held by Hon. Peter B. Olney, Referee in Bankruptcy, in charge of said proceedings, the plaintiff herein on the 14th day of July, 1941, was duly appointed Trustee in Bankruptcy, and [fol. 38] duly qualified and is now acting as such Trustee.

12. That on or about November 28th, 1940, and within one year prior to the filing of the petition in bankruptcy as aforesaid, the bankrupt above named transferred to the defendant herein the sum of $150,000.00.

13. That the transfer aforesaid was made while the said bankrupt was insolvent, or its insolvency imminent, with the intent of giving a preference to the defendant over other creditors of the corporation within the meaning of Section 15 of the Stock Corporation Law of the State of New York.

14. That at the time of the transfer referred to in the preceding paragraph, the defendant had notice or reasonable cause to believe that the payment of said sum of $150,000.00 as aforesaid would effect a preference.

15. That the aforesaid transfer was void and in violation of Section 15 of the Stock Corporation Law of the State of New York.

Wherefore, plaintiff demands judgment against the defendant in the sum of $150,000.00, together with interest thereon from November 28th, 1940, besides the costs and disbursements of this action.

M. Carl Levine, Morgulas & Foreman, Attorneys for Plaintiff, Office & P. O. Address, 521 Fifth Avenue, Borough of Manhattan, New York City.

[fol. 39] IN SUPREME COURT OF NEW YORK

AMENDED ANSWER, READ IN SUPPORT OF MOTION

[Same title]

Defendant, by Paul E. Mead, its attorney, for its amended answer to the complaint:

To the First Cause of Action:

I. Denies that it has any knowledge or information sufficient to form a belief as to the truth of any of the allegations of paragraphs numbered 1 and 3.

II. Denies each and every allegation of paragraph numbered 4 except that it admits that on or about November 27, 1940, Graves-Quinn Corporation drew and delivered to defendant a check on its account with defendant for $150,000.

III. Denies each and every allegation of paragraphs numbered 5 and 6.

IV. Denies each and every allegation of paragraph numbered 8 except that defendant admits it has not paid to plaintiff the said sum of $150,000 or any part thereof.

To the Second Cause of Action:

V. Denies that it has any knowledge or information sufficient to form a belief as to any of the allegations of paragraphs numbered 10 and 11.

VI. Denies each and every allegation of paragraph numbered 12 except that it admits that on or about November [fol. 40] 27, 1940 Graves-Quinn Corporation drew and delivered to defendant a check on its account with defendant for $150,000.

VII. Upon information and belief denies so much of paragraph numbered 13 as alleges that Graves-Quinn Corporation was insolvent or its insolvency imminent at the time of the alleged transfer and otherwise denies each and every allegation of said paragraph.

VIII. Denies each and every allegation of paragraphs numbered 14 and 15.

For a First Defense to Each of the Causes of Action Set Forth in the Complaint, Defendant Alleges:

IX. Upon information and belief that on or about the 14th day of September, 1940 Graves-Quinn Corporation entered into a certain War Department Contract No. W 6191 qm-131 with the United States of America for the construction by said corporation of certain housing projects in the States of Maine, Massachusetts and Rhode Island for a stated consideration of $1,008,800.

X. That thereafter said Graves-Quinn Corporation made application to defendant for assistance in financing such construction by making to it from time to time loans of money against payments to be received by said corporation from the United States as the work progressed.

XI. That defendant undertook to render such financial assistance, and commencing on October 10, 1940 defendant [fol. 41] from time to time loaned money to said Graves-Quinn Corporation evidenced by its promissory notes upon the promise of said corporation that all such notes outstanding at any of the times when payments were received by it from the United States should be thereupon fully paid and that such payment should be made without regard to the maturity dates of such notes.

XII. That on or about November 27, 1940 said Graves-Quinn Corporation received from the United States for work done pursuant to the aforesaid contract payment by check in the sum of $155,865.50.

XIII. That the check aforesaid was duly endorsed by said Graves-Quinn Corporation and thereafter and on November 27, 1940 was delivered to defendant, and on November 28, 1940 was credited to the account maintained by said Graves-Quinn Corporation with defendant.

XIV. That on November 28, 1940, when the aforesaid check was credited to the account of Graves-Quinn Corporation, defendant held four promissory notes made by said corporation aggregating the face amount of $150,000.

XV. That by their terms three of the said notes aggregating $100,000 were payable on demand, and one note for $50,000 payable on December 9, 1940.

XVI. That the aforesaid note for $50,000 was properly payable at the time Graves-Quinn Corporation received said payment of $155,865.50 from the United States by reason of the agreement made at the time defendant undertook to [fol. 42] make advances to Graves-Quinn Corporation in connection with the contract aforesaid that such advances should be repaid as and when said corporation was paid by the United States.

XVII. That on and after November 27, 1940 defendant had a lien and right of offset against the deposit balance of Graves-Quinn Corporation to the amount of $150,000.

XVIII. That on or about November 27, 1940 Graves-Quinn Corporation issued and delivered to defendant its check for $150,000 on its said account, by reason of which its said account was on November 28, 1940 debited in said amount and the liability of Graves-Quinn Corporation on the aforesaid notes aggregating the principal sum of $150,000 fully discharged.

XIX. That the said transaction constitutes the transfer and payment of which plaintiff complains.

XX. That the delivery and credit of the check for $155,865.50 as aforesaid and the payment of the said notes were in the normal and regular course of business as it had been carried on between Graves-Quinn Corporation and defendant prior to said transaction, and as such business continued to be carried on thereafter, whereby outstanding notes were retired as Graves-Quinn received payments from the United States pursuant to its said contract and new advances were made by defendant in anticipation of further payments thereafter to be received from the United States.

[fol. 43] For a Second Defense to Each of the Causes of Action Set Forth in the Complaint, Defendant Alleges:

XXI. Defendant repeats and realleges each of the allegations of paragraphs IX, X and XI.

XXII. That on or about the 20th day of November, 1940 Graves-Quinn Corporation for a valuable consideration executed and delivered to defendant as security to all existing and future loans made to it by defendant an assignment of all its right, title and interest in and to any and all sums of money then due or thereafter to become due under the

aforesaid contract. Copy of said assignment marked Exhibit A is annexed hereto and made a part hereof.

XXIII. The assignment aforesaid was duly approved by the Secretary of War and written notice of said assignment, together with true copies of the instrument of assignment were duly filed with the General Accounting Office, the contracting officer, the surety upon the bonds in connection with the contract aforesaid and the disbursing officer designated in such contract to make payment, all pursuant to the "Assignment of Claims Act of 1940."

XXIV. That as of November 18, 1940 there was payable to Graves-Quinn Corporation under the contract referred to in said assignment the sum of $155,865.50, and thereafter and prior to November 28, 1940 a check in said amount in favor of Graves-Quinn Corporation was issued and delivered to said corporation which by reason of the said [fol. 44] assignment received said check as the property of defendant.

XXV. That on November 27, 1940 said check for $155,865.50, duly endorsed, was delivered to defendant, and by it received in both the due and normal course of business and as assignee as aforesaid and out of the avails thereof defendant received the sum of $150,000 in discharge of the outstanding obligations of Graves-Quinn Corporation to defendant then due and payable.

XXVI. That said payment is the payment and transfer referred to in the complaint herein.

For a Third Partial Defense to Each of the Causes of Action Set Forth in the Complaint, Defendant Alleges:

XXVII. Repeats and realleges each of the allegations of paragraphs XXI-XXV, inclusive.

XXVIII. That after execution of the assignment aforesaid and, after there became due and payable to Graves-Quinn Corporation, pursuant to the contract referred to in said assignment, the sum of $155,865.50, defendant in reliance on said assignment loaned to said Graves-Quinn Corporation further sums of money evidenced by its demand promissory note for $40,000, bearing date November 20, 1940 and entered on the books of defendant on November 28, 1941.

XXIX. That the transfer and payment of $150,000 of which plaintiff complains included the sum of $40,000 to take up the said note.

[fol. 45] Wherefore, defendant demands judgment that the complaint be dismissed with costs.

Paul E. Mead, Attorney for Defendant, Office & P. O. Address, One Wall Street, Borough of Manhattan, City of New York.

In Supreme Court of New York

Affidavit of David Morgulas, Read in Opposition to Motion

[Same Title]

State of New York,
County of New York, ss.:

David Morgulas, being duly sworn, deposes and says:

I am a member of the firm of M. Carl Levine, Morgulas & Foreman, the attorneys for the plaintiff herein.

I am familiar with the facts herein, having examined the records of the bankrupt at great length and having also commenced an examination before trial of Orville E. Miles, the Assistant Secretary of the Irving Trust Company, who makes the moving affidavit on the instant motion.

The statements which I will hereinafter make are derived both from my examination of the bankrupt's affairs as well as from my examination of Mr. Miles.

[fol. 46] The instant motion is made to dismiss the first cause of action, upon the ground that the defenses thereto are sufficient as a matter of law and are founded upon facts established by documentary evidence or official record. Interspersed with many of the conceded facts, we find both argumentative statements and statements which are decidedly not the fact, and this applies to some of the most important points at issue, namely, the dates of the deliveries of the checks for $150,000 and $155,865.50, as well as the facts relating to the alleged assignment. In order to clarify the issues, I believe it is necessary to first briefly consider the pleadings.

The first cause of action, which is the subject of the instant motion, seeks to set aside a preferential payment made

on November 28th, 1940 in the amount of $150,000 for and on account of an antecedent debt. There are three defenses to the first cause of action, the third of which defense is labelled a "partial defense".

The first defense is to the effect that the bankrupt made application to the defendant for assistance in financing the performance of a government contract for the construction of certain housing projects in the New England area, and that the defendant undertook to render such assistance, commencing on October 10th, 1940, and thereafter loaned money to the bankrupt from time to time, and that these monies were to be repaid as and when the bankrupt received monies from the United States on account of the aforesaid contract, without regard to the maturity dates.

Defendant then alleges that on November 27th, 1940, Graves-Quinn received a check from the Government in the [fol. 47] sum of $155,865.50, and that the check was endorsed and delivered by Graves-Quinn to the defendant on November 27th, 1940, and on November 28th, 1940 it was credited to the account maintained by Graves-Quinn with the defendant.

The defendant then goes on to state that on November 28th, 1940, there were outstanding $100,000 of promissory notes, payable on demand, and one note payable on December 9th, 1940 for $50,000. Paragraph 16 of the answer then alleges that the aforesaid $50,000 note was properly payable by reason of the alleged agreement that the bank was to receive prepayment of all amounts outstanding as and when payments were received from the Government.

There is a further allegation that on November 27th, Graves-Quinn delivered to the defendant its check for $150,000 by reason of which its account was, on November 28th, credited in a similar amount.

The second defense is to the effect that on November 20th, 1940, Graves-Quinn delivered to the defendant, "as security for all existing and future loans made to it by the defendant, an assignment of all its right, title and interest in and to the monies then due or to become due from the Government," and that said assignment was duly approved by the Secretary of War. That as of November 18th, 1940, there was payable to Graves-Quinn, under the aforesaid contract referred to in the assignment, the sum of $155,865.50, and that said check was on November 27th delivered to the defendant and received by it in the normal course

of business and as assignee, and that the defendant [fol. 48] received from the said check $150,000 in discharge of outstanding obligations.

The third partial defense is to the effect that after the execution of the aforesaid assignment, the defendant, in reliance on the said assignment, loaned $40,000 to the bankrupt on November 20th, 1940. The defendant then alleges that the transfer and payment of the $150,000 of which the plaintiff complains included the sum of $40,000 to take up the aforesaid note.

Of all the three defenses, this last so-called "partial" defense is the one which is most viciously false, for, it will hereinafter be disclosed that it appears from the defendant's own records, that this alleged assignment was not delivered to it until November 22nd, 1940, so that the loan of $40,000 could not have conceivably been issued in reliance on the assignment on November 20th, 1940. *This, of course, entirely overlooks the fact that the assignment was not effective until it was approved by the Secretary of War on December 5, 1940, and the defendant both realized that fact and its records so indicate.* But regardless of whether the assignment was effective as of the date of delivery (November 22nd), or on the date it was approved by the Secretary of War (December 5th) it certainly was not effective on November 20th, 1940, two days before it was delivered.

Defendant has very conveniently taken the date of the assignment, which is November 20th, and assumed that it was delivered on that date, but we will hereinafter show that it was not delivered on that day, and that, in fact, Mr. Miles took a plane trip to Boston in order to obtain the assignment on November 22nd.

[fol. 49] It is necessary, however, to point out some of the more glaring inaccuracies in the moving affidavit, which go to the very foundation of this motion.

It is stated, to begin with, that there was some agreement on the part of the defendant to finance the job, and to receive all the monies coming due from the Government in repayment. That is not the fact, and the defendant's own records so indicate.

We have been examining the bank before trial, and during the course of examination there has been offered in evidence certain memoranda, made by Mr. Miles, the Assistant Secretary of the bank in connection with the Graves-

Quinn account. Thus, Exhibit VI shows the memorandum of Mr. Miles for October 10th, 1940, which states the following:

> "Messrs. Graves and Quinn called and borrowed $30,000 on a one month note. On the 15th of October they will requisition from $150 200,000 on an Army job recently begun. When this requisition is received our note is to be anticipated."

On October 24th, 1940, it appears that Messrs. Graves and Quinn called on the bank and borrowed $40,000 for ten days. Again, the bank's records fail to indicate any understanding to finance the job, and, on the contrary, it then appeared to the bank that it would be repaid within a week.

Under date of October 31st, we find this illuminating memorandum made by Mr. Miles, when Graves-Quinn came [fol. 50] to the bank and asked for an additional $30,000:

> "Mr. Graves telephoned from Boston. A requisition was approved as of October 15, amounting to $97,000. After the retainage the net amount coming to Graves-Quinn will be $87,314. This check was expected yesterday but was delayed. They have been promised that it will definitely be in their hands today and it should, therefore, be received by us for deposit tomorrow morning.
>
> In the meantime they require approximately $30,000 further advance in order to provide payroll money today. They will send a note air mail at once which should reach us this afternoon. Upon receipt of the check for $87,000, present loans amounting to $70,000 will be anticipated."

We respectfully point out that there is not the slightest suggestion of any agreement to finance anybody, nor is there the slightest suggestion of an assignment of any monies.

In fact, it was not until November 15th, 1940, that the first thought of an assignment was broached, and then there was actually owing to the bank about $85,000, and it clearly appeared that unless more money were loaned to carry the bankrupt over the period when it would receive the large

payment from the Government, disaster to the bank would follow.

Nor was it the purpose of this assignment to secure defendant for advances to be made as Mr. Miles states in his affidavit. It appears from Exhibit X, introduced on the ex- [fol. 51] amination before trial, being Mr. Miles' memorandum of November 27th, as follows:

> "Messrs. Cobb, Petersen, Keenan and the writer discussed this case and arrived at the decision that upon receipt of the check covering November 18th requisition, which would repay company's indebtedness to us, we should inform them of our unwillingness to make any further advances unless the surety companies would give us some satisfactory undertaking not to come between us and payments, due Graves-Quinn under the contract, which have been assigned to us."

In other words, it was the obvious purpose to obtain this assignment, grab whatever monies the bank could to repay the loans, and then refuse to make any more advances unless the Standard Accident Insurance Company would give satisfactory assurances to the bank that it would take a back seat, or in other words, suffer the loss.

Thus, it is clear that the assignment was not obtained in the usual and customary course of the business, but on the contrary, the assignment was part of a clever scheme whereby the bank intended to place itself in a position to grab the monies from the Government and then refuse to advance any more monies.

Thus, the very purpose of the Assignment of Claims Act was to be frustrated.

It is to be borne in mind that prior to October 9th, 1940, assignments of claims against the Government were illegal. It was only by virtue of the Assignment of Claims Act, ap- [fol. 52] proved by the President of the United States on October 9th, 1940, a copy of which is annexed hereto, that assignments were permitted. Its purpose was to facilitate the making of advances by banks on the strength of assignments which were approved by the Secretary of War.

It is therefore highly significant to note that it was the obvious intention of the bank not to make any advances once the War Department had approved the assignment. Further, it appears from the notations of November 27th,

1940 that the bank did not even consider asking for approval of the assignment until it had grabbed the Government check and could then say to the Surety Companies, subordinate your position to ours, or let Graves-Quinn go to pot.

That is a far cry from Mr. Miles' present statement in his affidavit that the purpose of the assignment was to secure the defendant for advances to be made.

The only part of the statement that has any accuracy is that the assignment was to secure the defendant for advances already made, something which is directly prohibited by the Bankruptcy Act.

As to when the Government check for $155,865.50 and the Graves-Quinn check for $150,000 were delivered to the bank, we have also but to look at Mr. Miles' memorandum of November 28th, which reads in part as follows:

> "Although Mr. Graves informed us by telephone at 4:45 yesterday afternoon that the Government check had been received and would be mailed shortly thereafter, the check had not arrived in this morning's mail. [fol. 53] The Graves-Quinn office in New York was in receipt of a letter from Mr. Graves, written yesterday evening, stating that the check had been mailed to us. Shortly before 1 o'clock in the afternoon Mr. Graves arrived at our office. In view of the short time available to the company to arrange for the payroll which needed to be prepared this afternoon, it was decided to disclose our position to Mr. Graves. I informed him that although we had sent a special messenger to the Post Office at various times, we had been unable to obtain the check. When I explained our unwillingness to make additional loans without some form of guarantee from the surety companies and that it would be necessary to get in touch with them promptly, Mr. Graves was most anxious that we receive our check before the call was made. About 2 o'clock the check arrived. The envelope bore Boston postmark '10 P. M.' yesterday."

So, to begin with, it is clear that the bank did not receive either check until November 28th, 1940. So great was the bank's fear and anxiety that, as Mr. Miles' memorandum indicates, the bank sent a special messenger to the Post

Office at various times in an effort to locate the check. Evidently they felt that something might happen before the check came into their hands on the 28th, in the regular and normal course.

This is a far cry from the bank's statement in its answer that everything was done in the normal and usual business course. It is obvious that the bank realized that there was [fol. 54] trouble, and that it not only sent its representatives to Boston by plane on November 22nd, 1940 to make assurance doubly sure, but it even could not trust the delivery of the check to the mail-carrier.

How, then, can the bank say that it had no cause to believe that the Graves-Quinn Corporation was insolvent, or how can it state that the check was delivered to it on the 27th? While Graves-Quinn may have mailed the checks from Boston on November 27th, the checks were not received by the defendant until November 28th, 1940. That the bank will and must concede.

As a matter of fact, their own records indicate that the deposit of both the Government check and the check of Graves-Quinn for $150,000 was made on November 28th. We are submitting herewith a photostatic copy of the bank statement for November, 1940, which will show the deposit of both checks on November 28th.

It is also highly significant that the same statement shows an overdraft on November 28th, 1940 of $41,550 and an overdraft on the 29th of November, 1940, of $17,867.47.

Certainly, if nothing else, all these matters must give rise to the inference that the bank certainly had some reason to be put on notice that everything was not "right" with Graves-Quinn, when it applied the $150,000 to the past indebtedness.

The defendant would give this Court the impression that the assignment was made on November 20th, 1940, and that the assignment was effective as of that date, and that the bank loaned any monies on the strength thereof. To begin with, the bank was fully aware of the fact that the as- [fol. 55] signment had no validity unless the consent of the Secretary of War was obtained. Furthermore, at the very time the question of the assignment was first broached on November 15th, 1940, we find the following memorandum

made by Mr. Miles as to what occurred on November 15th, 1940:

"Assistance will be required to meet next week's payroll, in addition to which, if agreeable to us, they could use $100,000 to discount material bills.

"They are willing to assign the contract to us but as it is dated prior to the date of the Act authorizing the assignment of Government contracts the consent of the Government will be required. This probably would take some time; furthermore, since the job is for a fixed amount it does not seem likely that an assignment of the contract would protect us against a loss on the contract. It seems likely that such protection could be afforded only by a subordination of the rights of the surety company. We are now looking into this question further.

"As a partial offset to the $60,000 required for the payroll yesterday, we are today putting on a demand note for $30,000 bringing total loans to $80,000. We have agreed to loan an additional $30,000 on next Wednesday for payroll purposes. *The entire indebtedness should be retired two or three days after that date, when a check for the November 18th requisition should be received.*"

Mr. Miles' memorandum made on November 26th, 1940, clearly indicates the defendant's fear that something might [fol. 56] happen to the payment then about to be made by the Government to Graves-Quinn. It also clearly shows that they refused to use the assignment lest it cause a delay. The memorandum made under that date by Mr. Miles reads in part as follows:

"Upon learning by telephone from Mr. Graves that the amount to be allowed by the Government for the payment as of November 18, probably would be less than half the sum that Graves-Quinn previously had estimated, and as we had not received the executed assignments of payments to be due under the contract, the writer went to Boston by plane at noon on Friday, November 22. The purpose of the trip was to:

1. Obtain the signed assignments.
2. Investigate the discrepancy between the estimated current payment and the amount actually allowed.

3. Ascertain the present status, and, if possible, to estimate the financial outcome of the job.

"The assignments were found to have been already executed and were delivered to me shortly after arrival. Any delay in their completion had been occasioned by the pressure under which Messrs. Graves and Quinn were working to attend to many details constantly arising in connection with the job. As there appeared to be [fol. 57] no emergency that would forestall the orderly payment of the present requisition, amounting to $155,000, net, it was decided to refrain from filing the assignment immediately as it was feared such action might further delay issuance of the check."

It was only after defendant felt certain that the payment of $155,000 was in the mail that the defendant finally decided to request the Government's approval of the assignment, and Mr. Miles' memorandum under date of November 27th bears that out, viz:

"Mr. Cobb talked with Mr. Kidd on the telephone and it was decided to write a letter requesting the approval of the War Department to the filing of the assignment. It was felt that by this time the filing of such a request would not interfere with the issuance of the check in payment of the November 18th requisition, and in the event the check is not turned over to us and our loan not liquidated, the assignment would cover further amounts due by the War Department under the contract."

As a matter of fact, the bank did refuse to loan any further monies until it had obtained a commitment from the Standard Accident Insurance Company that it would do nothing to interfere with the contract, witness the following:

[fol. 58] "December 6, 1940.

Irving Trust Company
Park Avenue at 42nd Street
New York, N. Y.

Subject: BO-385315—Contract No. W-6101-qm. 131, dated September 14, 1940 between the United States of America and Graves-Quinn Corporation.

GENTLEMEN:

As you know, our company is surety on bonds of Graves-Quinn Corporation in connection with the above contract.

In consideration of such loans as have heretofore or which hereafter may be made by you to Graves-Quinn Corporation, we agree that we, acting alone or with others, will commit no act in anywise to interfere with the performance by Graves-Quinn Corporation of work to be done under said contract until such time as your loans are fully repaid. We do hereby further agree that in the event any claim or claims should be made upon us under our bonds in connection with said contract by any materialmen, sub-contractors or laborers, we will take no act in anywise to interfere with the payments from the United States under said contract until your loans are fully paid.

We shall have no obligation hereunder unless with respect to each loan you shall deliver to us a letter [fol. 59] signed by Graves-Quinn Corporation by its President and Treasurer in the form attached.

Very truly yours, Standard Accident Insurance Company, by C. W. Kuhn.

Approved: Graves-Quinn Corp., by Wm. T. Quinn, Pres., Lewis W. Graves, Treas.

on side: Approved Wm. T. Quinn. Approved Lewis W. Graves."

"December 6, 1940.

The Irving Trust Company,
Park Avenue at 42nd Street,
New York, N. Y. and
Standard Accident Insurance Company,
111 John Street,
New York, N. Y.

Subject: BO-385315—Contract No. W 610f qm-131, dated September 14, 1940 between the United States of America and Graves-Quinn Corporation.

GENTLEMEN:

We are applying to the Irving Trust Company for a loan in the sum of $10,000 and we agree that the pro-

ceeds of this loan will be held by us in trust for the pay-
[fol. 60] ment of obligations arising in connection with the performance of the above described contract.

Very truly yours, Graves-Quinn Corporation, by Wm. T. Quinn, President.

Attest: —— ——, Treasurer.

We join in the above: William T. Quinn, Lewis W. Graves."

In fact, the Secretary of War did not approve the assignment until December 5th. It is therefore elementary that all the defendant actually used the assignment for was to repay itself for the monies advanced prior to November 28th. Unless it obtained the aforesaid letter from the Standard Accident Insurance Company, the defendant would not and did not intend to lend any money on the assignment.

I respectfully submit that there is no merit in the instant motion and that it should be denied.

David Morgulas.

(Sworn to before Lillian M. Fox October 16, 1942.)

Affidavit of Plaintiff

Bank Statement

(Opposite)

(Here follow 2 photolithographs, side folios 61, 61a)

IRVING TRUST COMPANY
NEW YORK

Graves-Quinn Corporation,
Grand Central Terminal,
New York, N. Y.

L.O. Room 1724.

Nov. 1940 From Line.

PLEASE EXAMINE AT ONCE
IF NO EXCEPTIONS ARE REPORTED BY THE 10TH OF THE FOLLOWING MONTH, ACCOUNT WILL BE CONSIDERED CORRECT
NOTIFY US PROMPTLY OF ANY DELAY IN RECEIPT OF STATEMENT AND VOUCHERS

	DEBITS		CREDITS		BALANCE	
				BALANCE FORWARD →		2059.28-
			1 87,314.06	✓		
			1 32000.00		1	
					1 90254.78	
1	70000.00-	32000.00-				
1	1661.64-		1 cc 35000.00	✓		
			1 51.37		1 21644.51	
2	164.40-				2 21480.11	
4	390.87 LSI				4 21089.24	
4	1000.00-	23.25-			4 20065.99	
6	2336.08 LSI				6 17729.91	
6	450.00-				6 17279.91	
6	12679.71-				6 4600.20	
7	320-	74.88-				
7	176.89-	649.03-				
7	200.00-	216.00-			7 3280.20	
7	29736.93-		7 cc 49800.00	✓	7 23343.67	
8	225.00-	48.00-				
8	60.00-				8 23010.67	
8	2087.76-		89808.88	✓	8 110731.79	
9	501.30-	50.37-				
9	850.00-				9 109330.12	
10	132.60-	226.62-			10 108970.90	
13	8000.00-	750.00-				
13	100.00-				13 100120.90	
13	35052.50-				13 65068.40	
14	100.00-	7400.00-			14 57568.40	
14	13278.63-	46448.72-				
14	600.00-				14 2758.95	
18	500.00-	174.00-				
18	68.00-	928.00-			18 8928.95	
18	239.27-		18 cc 30000.00	✓	18 18676.78	
18	184.12-				18 18492.66	
18	175.00-				18 18317.66	
19	2970.20 LSI		18 cc 30000.00	✓	18	
					19 48317.66	
					19 45347.46	

LAST AMOUNT IN THIS COLUMN IS YOUR BALANCE

New York, N. Y.

L.O. Room 1714. From Line.

PLEASE EXAMINE AT ONCE

IF NO EXCEPTIONS ARE REPORTED BY THE 10TH OF THE FOLLOWING MONTH, ACCOUNT WILL BE CONSIDERED CORRECT. NOTIFY US PROMPTLY OF ANY DELAY IN RECEIPT OF STATEMENT AND VOUCHERS.

	DEBITS		CREDITS		BALANCE	
				BALANCE FORWARD		[redacted]9,059.28-
			1	87,314.06		
			1	3200.00	1	
					1	90,254.78*
1	70,000.00-	32,000.00-				
1	1,661.84-		1 CC	35000.00		
			1	5137	1	21,644.51*
2	164.40-				2	21,480.11*
4	390.87 LSI				4	21,089.24*
4	1,000.00-	23.25-			4	20,065.99*
6	2,336.08 LSI				6	17,729.91*
6	450.00-				6	17,279.91*
6	12,679.71-				6	4,600.20*
7	3.20-	7.88-				
7	176.89-	649.03-				
7	200.00-	216.00-			7	3,280.20*
7	29,736.53-		7 CC	49,800.00	7	23,343.67*
8	225.00-	48.00-				
8	60.00-				8	23,010.67*
8	2,087.76-			89,808.88	8	110,731.79*
9	501.30-	50.37-				
9	850.00-				9	109,330.12*
12	132.60-	226.62-			12	108,970.90*
13	8,000.00-	750.00-				
13	100.00-				13	100,120.90*
13	35,052.50-				13	65,068.40*
14	100.00-	7,400.00-			14	57,568.40*
14	13,278.63-	46,448.72-				
14	600.00-				14	2,758.95*
15	5,000.00-	174.00-				
15	68.00-	928.00-			15	8,928.95*
15	239.27-		15 CC	30000.00	15	18,676.78*
16	184.12-				16	18,492.66*
16	175.00-				16	18,317.66*
19	2,970.20 LSI		18 CC	30,000.00	18	
					18	48,317.66*
					19	45,347.46*

LAST AMOUNT IN THIS COLUMN IS YOUR BALANCE

[redacted]

404

IRVING TRUST COMPANY
NEW YORK

Gravel-Quinn Corpation,
Grand Central Terminal,
New York, N. Y.

L O. Room 1723 Nov. 1940 b

NOV 20 1940

PLEASE EXAMINE AT ONCE

[illegible] WILL BE CONSIDERED BY THE 15th OF THE FOLLOWING MONTH ACCOUNT WILL BE CONSIDERED CORRECT
[illegible] PROMPTLY OF ANY DELAY IN RECEIPT OF STATEMENT AND VOUCHERS

	DEBITS		CREDITS		BALANCE	
			BALANCE FORWARD			
28	5345.08				28	40,002.40
30	44624.40-				30	4,622.00
28	8001.94				28	12,623.94
28	2756.99-		28	35.00	28	15345.03
28	3492.23				28	18,838.16
28	1000.00-	1000.00-				
28	457.04-	250.00-			28	21,545.20
28	2500.00-	9000.00-			28	
					28	33045.20
26	180.00-	268.58-				
26	361.62-	48.60-				
26	700.00-	5000.00-				
26	100.00-				26	39,704.00
26	1000.00-				26	40,704.00
27	108.00-				27	40,812.00
28	102.00-	2223-				
28	26.00-	1577.00-				
28	209.77-				28	41,550.00
28	93.75-	26.46-				
28	4726.20-	17389.06-				
28	150000.00-		28	155865.50		
			28 cc	40000.00		
			28	62.50	28	13,867.47
29	4000.00-				29	17,867.47
29	3219.94-	19163.81-				
29	297.98-		29 cc	82000.00	29	9,801.00
30	46.00-	6000.00-				
30	2000.00-	116.72-				
30	7000.00-	3000.00-			30	8362.82

Overdraft

[fol. 62] ASSIGNMENT OF CLAIMS UNDER CONTRACTS

(Public—No. 811—76th Congress.)

(Chapter 779—3d Session.)

(H. R. 10464.)

AN ACT

To Assist in the National-Defense Program by Amending Sections 3477 and 3737 of the Revised Statutes to Permit the Assignment of Claims Under Public Contracts.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That sections 3477 and 3737 of the Revised Statutes be amended by adding at the end of each such section the following new paragraph:

"The provisions of the preceding paragraph shall not apply in any case in which the moneys due or to become due from the United States or from any agency or department thereof, under a contract providing for payments aggregating $1,000 or more, are assigned to a bank, trust company, or other financing institution, including any Federal lending agency: Provided,

"1. That in the case of any contract entered into prior to the date of approval of the Assignment of Claims Act of 1940, no claim shall be assigned without the consent of the head of the department or agency concerned;

"2. That in the case of any contract entered into after the date of approval of the Assignment of Claims Act of [fol. 63] 1940, no claim shall be assigned if it arises under a contract which forbids such assignment;

"3. That unless otherwise expressly permitted by such contract any such assignment shall cover all amounts payable under such contract and not already paid, shall not be made to more than one party, and shall not be subject to further assignment, except that any such assignment may be made to one party as agent or trustee for two or more parties participating in such financing;

"4. That in the event of any such assignment, the assignee thereof shall file written notice of the assignment

together with a true copy of the instrument of assignment with:

"(a) The General Accounting Office,

"(b) the contracting officer or the head of his department or agency,

"(c) the surety or sureties upon the bond or bonds, if any, in connection with such contract, and

"(d) the disbursing officer, if any, designated in such contract to make payment.

Notwithstanding any law to the contrary governing the validity of assignments, any assignment pursuant to the Assignment of Claims Act of 1940 shall constitute a valid assignment for all purposes."

Any contract entered into by the War Department or the Navy Department may provide that payments to an assignee of any claim arising under such contract shall not [fol. 64] be subject to reduction or set-off, and if it is so provided in such contract, such payments shall not be subject to reduction or set-off for any indebtedness of the assignor to the United States arising independently of such contract.

Sec. 2. This Act may be cited as the "Assignment of Claims Act of 1940".

Approved, October 9, 1940.

R. S. 3737—Sec. 15 of Public Contracts—U. S. C. A.

No transfer of contract—No contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States are concerned.

R. S. 3477—Sec. 203—Title 31, Money and Finance—U. S. C. A.

All transfers and assignments made of any claim upon the United States * * * and all powers of attorney, orders, or other authorities for receiving payment of any such claim—shall be absolutely null and void, unless they

are fully made—after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof.

[fol. 65] In Supreme Court of New York

Reply Affidavit of William A. Onderdonk, Read in Support of Motion

[Same Title]

State of New York,
County of New York, ss.:

William A. Onderdonk, being duly sworn, says: I have read the answering affidavit on behalf of plaintiff. It deals largely with what is irrelevant on this motion.

We are not asking the court to determine either the issue of solvency raised by the pleadings, or the issue of the knowledge of defendant at the time its debt was paid. This debt was paid as debts similarly contracted by Graves-Quinn both before and after were paid, viz., out of the Government payments for work which defendant had financed.

For two or three months after the payment complained of and until the contract was completed, defendant continued its advances, Graves-Quinn continued performance of the contract and the advances were repaid from time to time in precisely the same way—out of Government payments.

On March 28, 1941 the Standard Accident Insurance Company, which was enough interested in the financial assistance of defendant to write the letter of December 6, 1940 (opposing affidavit, pp. 11, 12) procured the filing of a petition in bankruptcy. The trustee is its selection and its attorneys are his attorneys.

The first cause of action alleges that the payment complained of was a preferential transfer under the Bankruptcy Act (Section 60). One of the essentials of a preferential transfer is that the transfer occur within four months of the [fol. 66] filing of the petition. The sole issue before the court on this motion is whether the transfer occurred within this four months' period. If it did not, the transfer was not

preferential and this is so even if Graves-Quinn was hopelessly insolvent at the time and defendant knew all about it.

The issue raised by defendant in its motion involves questions of law principally, if not wholly, which will be thoroughly treated in the brief to be handed up on the argument.

We can only construe the irrelevancies in the opposing affidavit as designed to confuse the single issue raised and to create an atmosphere inimical to defendant in the consideration of that issue. Else why the effort to discredit defendant when that objective has no bearing whatever on the one question whether the transfer was made less than four months or more than four months before the filing of the petition. Plaintiff apparently thinks the court may be misled into assumig that Graves-Quinn was insolvent at the time of the transfer (there is no evidence of it in the record), and inferring that defendant had knowledge of the assumed insolvency (there is no basis for the inference) and thereupon deny the motion. To deny the motion on that basis would be to by-pass the motion made by defendant. We are asking the court to find on undisputed facts that the transfer was made more than four months prior to the filing of the petition. If that conclusion is reached, the first cause of action must be dismissed regardless of the facts as to the solvency of Graves-Quinn and the knowledge of defendant.

Despite the irrelevance of most of the opposing affidavit defendant is not content that the misstatements of fact [fol. 67] should go wholly unnoted. And what is here said in the interest of a true picture will be taken mostly from the documents.

There is nothing sinister about the assignment of Graves-Quinn to defendant. In a memo of Mr. Miles dated November 7, 1940, which was marked by plaintiff upon his examination of defendant before trial as Ex. VII, this reference was made to an assignment:

> "Depending upon the amount they are likely to require, I told Mr. Graves we might wish to have the contract assigned to us. He said they would have no objection to this procedure if we desired."

In a memo dated November 15, 1940 (Pltf. Ex. VIII) Mr. Miles wrote:

"After obtaining Mr. Van. Doren's approval, informed Mr. Graves that we are agreeable to lending the company an additional $30,000 at present and also $40,000 for next week's payroll.

"They are to assign to us payments to become due under the contracts covering the Government job on which they are engaged. Since the asignment of the contract requires the approval of Government authorities, which will probably take some time, he was told that we are agreeable to mak ing the loans with the understanding that Graves-Quinn will execute the assignment, approval of the Government to be obtained later. Mr. Kidd is drawing up the necessary papers."

[fol. 68] The assignment was executed on November 20th and as Mr. Miles says in his moving affidavit (p. 2) was received by him on behalf of defendant on November 22, 1940. We assume for the purposes of this motion at least that it was not effective before delivery. In what he has to say about the $40,000 loan (p. 4) Mr. Morgulas overlooks the fact that at the time of the assignment the notes outstanding aggregated $110,000 (Ex. A, attached to moving papers). As appears from both the affidavit of Mr. Miles (p. 2) and the statement of the Graves-Quinn account for November 1940 (attached to the opposing affidavit) the advances to Graves-Quinn between November 20th and November 28th were made by a constantly increasing overdraft. On November 28th the $40,000 note went on the books, thereby substantially wiping out the accumulated overdraft. This $40,000 advance was thus not made on November 20th, though the overdraft started on that day.

Mr. Morgulas makes (pp. 5, 6) some mysterious references to the financing of the job and to the purpose of the assignment. Obviously the bank was making frequent advances to finance the work, being repaid out of payment by the Government and then loaning again. Defendant was repaid not only the $150,000 of which plaintiff is complaining, but also several hundred thousand dollars additional (Ex. A, attached to the moving papers). When the financing was completed and the debts repaid, Graves-Quinn asked for and received a release of the assignment (Exs. D and E, attached to the moving papers).

The statement in the opposing affidavit that the bank refused after being repaid the $150,000 to make any further

advances until the letter of the surety, dated December 6, [fol. 69] 1940, is erroneous. An advance of $82,000 was made on November 29, 1940 (Ex. A, attached to moving papers.) This loan was made after the Boston trip was made by Mr. Miles, to which the opposing affidavit refers (p. 10). We add to the quotation in the opposing affidavit from the memo of November 26, 1940 (Pltf. Ex. X). Referring to the discrepancy between the requisition of Graves-Quinn of November 18, 1940 and the amount certified by the Government, Mr. Miles wrote:

"Considerable time was spent in checking the accuracy of Graves-Quinn's estimated requisition. Most of two days was taken in inspecting in detail seven (out of a total of twelve) sites where work is being done. Calculations based on these inspections lead me to conclude that the discrepancy (in total about $230,000) was due to:

1. An over estimate by Graves-Quinn of about $90,000, due to:

a. Lack of sufficient detail in some cases of the actual status of the work on certain sites.

b. Rain for three or four days at the end of the period covered, and after their estimate was made. This prevented the installation of certain items, such as furnaces, with a high dollar value in relation to cost of putting in place. (All of this material was available at the sites.)

2. Under estimate of the Government of about $140,000, due to:

[fol. 70] a. The employment of a system of estimating completed work, which is detrimental to the contractor in the early stages of erection (which is subsequently corrected as the building nears completion).

b. Ineptitude of many of the civilian inspectors employed by the Government and reluctance of their superiors to revise their estimates upward.

c. The fact that at the time this estimate was being made, Mr. Quinn was for three days engaged in an inspection tour with Major Richards and, thus, pre-

vented from going over the estimates with the inspectors who made them on the outlying jobs.

It is notable that for the Boston land forts, where a majority of the larger buildings are practically complete and where Mr. Quinn was able to check the figures with the individual inspectors, the discrepancy is negligible.

Major Richards, Quartermaster-General in charge of all construction in the New England area, stated that at present he is satisfied with the progress of the job and that the only thing that could stop payments being made would be the declaration by the Government that the contractor is in default.

As to the probable financial outcome of the job it is difficult to arrive at a definite conclusion because of the lack of sufficient detailed information relative to costs actually incurred to date and the exact amount of work yet to be completed. Because of the pressure for [fol. 71] the rapid completion of the job, which is a large one for Graves-Quinn they have omitted the maintenance of certain records, such as, job cost analysis. It is evident that the organization is inadequate in respect to the preparation of records that would be useful in a financial appraisal of the job. They are now willing to take on an accountant to be suggested by us but it is probably too late for such a step to be very helpful."

It is apparent that defendant was well within its rights in obtaining the assignment which an amendment in the law had made possible. It is apparent also that defendant was entitled to make the assignment effective by clarifying the relation of the surety to the contract.

The Government retained 10% of each amount certified as earned. There was a lag in payments after certification of the amount earned. The Government method of "estimating completed work" was not favorable to Graves-Quinn. The going was thereby made difficult for Graves-Quinn. But the more the facts are known the less excuse there appears for this suit. With the knowledge gained from a thorough examination of all the available records it is my belief that the action has no merit. We are not, however, on this motion trying all the issues raised by the plead-

ings. We are concerned with only one. The court is asked to determine if as matter of law the transfer complained of did not occur more than four months before the filing of the petition.

Wm. A. Onderdonk.

(Sworn to before Adam N. Keppler, October 22, 1942.)

[fol. 72] IN SUPREME COURT OF NEW YORK

REPLY AFFIDAVIT OF DAVID MORGULAS, READ IN OPPOSITION TO MOTION

[Same title]

STATE OF NEW YORK,
County of New York, ss.:

DAVID MORGULAS, being duly sworn, deposes and says:

I am a member of the firm of M. Carl Levine, Morgulas & Foreman, the attorneys for the plaintiff herein.

I make this affidavit in reply to the second affidavit of William A. Onderdonk, dated October 22nd, 1942.

For the first time, it appears from that affidavit that the sole question raised is whether "as a matter of law the transfer complained of did not occur more than four months before the filing of the petition".

It appears from Mr. Onderdonk's affidavit that almost sole reliance is placed on the delivery of the assignment to the Bank on November 22nd, 1940. It therefore becomes of the utmost importance for me to state the following facts:

The Standard Accident Insurance Company furnished the payment and performance bond required by the United States Government upon award of the New England contract to the Graves-Quinn Corporation. The assignment to the defendant bank dealt with the monies due and to become due on this New England contract. At the time Graves-Quinn Corporation obtained the Government contract, and under date of October 2nd, 1940, it executed an agreement of assignment and indemnity to the Standard

[fol. 73] Accident Insurance Company, which reads as follows:

"In further consideration of the execution of the said bond, the undersigned does hereby agree, as of this date, that the said Standard Accident Insurance Company shall, as surety on said bond, be subrogated to all rights, privileges and properties of the undersigned as principal and otherwise in said contract, and does hereby assign, transfer and convey to said Company all the deferred payments and retained percentages, and any and all moneys and properties that may be due and payable at the time of such breach or default, or that may thereafter become due and payable to said undersigned on account of said contract, or on account of extra work and materials supplied in connection therewith, hereby agreeing that all such moneys, and the proceeds of such payments and properties, shall be the sole property of the said Standard Accident Insurance Company, and to be by it credited upon any loan, cost, damage, charge and expense sustained, or incurred by it as above under its bond of suretyship."

A copy of the application for the contract bond and the agreement incorporating the aforesaid assignment is annexed hereto, marked Exhibit "A" and respectfully made a part hereof.

It will also be undisputed that many subcontractors were unpaid on November 20th. It is also undisputed that the Standard Accident Insurance Company, on completion of [fol. 74] the job actually paid over $300,000.00, in discharge of claims of various creditors of Graves-Quinn Corporation and its obligation on the aforesaid performance bond.

The aforesaid facts are most vital in considering the issues raised in the various moving affidavits, as well as in the matters referred to in the memorandum of counsel for the defendant.

David Morgulas.

(Sworn to before George R. Hall, October 27, 1942.)

EXHIBIT A, ANNEXED TO REPLY AFFIDAVIT OF DAVID MORGULAS, READ IN OPPOSITION TO MOTION

(Opposite)

(Here follow 4 photolithographs, side folios 75, 75a, 75b, 75c)

[illegible]

EXHIBIT "[illegible]" "A"

Agency ______________________ Bond No. [illegible]

Standard
Accident Insurance Company
DETROIT, MICHIGAN

APPLICATION FOR CONTRACT OR BID BOND

There should accompany this application: FINANCIAL STATEMENT, COPY OF CONTRACT AND SPECIFICATIONS, or in case of a bid bond; COPY OF ADVERTISEMENT and Instructions to Bidders.

1. Full Name of Applicant [illegible] Corporation
2. Business Address (street, city and state) Grand Central Terminal Bldg., New York, N. Y.
3. Amount of Bond: Proposal $ ______ Contract $[illegible] Maintenance $ ______ Penal $ ______
4. To Whom Given U. S. A.
(Give full name and business address. If a corporation, exact corporate title)

5. Nature of Contract Rehabilitation of various forts located at Portland, Maine; Boston, Massachusetts; Narragansett Bay & Providence, Rhode Island
6. Name and Address of Architect or Engineer in Charge ______
7. Contract Price $1,008,800.00
(If a bid bond, give amount of applicant's bid)
8. Other Bidders on above Contract, including Highest and Lowest: IMPORTANT.

NAME	ADDRESS	AMOUNT OF BID

9. Date work is to be commenced ______ Date to be completed ______
10. Penalty for non-completion on time $ ______ Premium if completed sooner $ ______
11. Payments, when and how made ______ Percentages retained: ______
12. Is this a man hour contract? ______ Number of man hours? ______
13. Are payments made in cash? ______ If not, by what method ______
14. If payments are in bonds, warrants, or other securities, advise fully what arrangements made for disposing of same ______
15. Will bond continue in force after construction is completed, to cover maintenance or repairs?
Nature: ______ For what period? ______
16. State which portion, if any, of work is guaranteed after completion and value of same $ ______
17. State nature and amount of the work to be sub-let ______
18. Will sub-contractors be required to give corporate bonds? ______
19. What is the estimated cost of work (by Architect or Engineer)? ______
20. What is your estimate of the cost of work to you? ______
21. With what bank have you arranged a loan for the purpose of handling this contract? ______

SPECIFICATIONS, or in case of a bid bond; COPY OF ADVERTISEMENT and Instructions to Bidders.

1. Full Name of Applicant [illegible] Corporation

2. Business Address (street, city and state) Grand Central Terminal Bldg., New York, N. Y.

3. Amount of Bond: Proposal $ .... Contract $[illegible] Maintenance $ .... Penal $ ....

4. To Whom Given U. S. A.

(Give full name and business address. If a corporation, exact corporate title)

5. Nature of Contract Rehabilitation of various forts located at Portland, Maine; Boston, Massachusetts; Narragansett Bay & Providence, Rhode Island

6. Name and Address of Architect or Engineer in Charge

7. Contract Price $1,[illegible].00

(If a bid bond, give amount of applicant's bid)

8. Other Bidders on above Contract, including Highest and Lowest: IMPORTANT.

NAME	ADDRESS	AMOUNT OF BID

9. Date work is to be commenced .... Date to be completed ....

10. Penalty for non-completion on time $ .... Premium if completed sooner $ ....

11. Payments, when and how made .... Percentage retained: ....

12. Is this a man hour contract? .... Number of man hours? ....

13. Are payments made in cash? .... If not, by what method ....

14. If payments are in bonds, warrants, or other securities, advise fully what arrangements made for disposing of same ....

15. Will bond continue in force after construction is completed, to cover maintenance or repairs?

Nature: .... For what period? ....

16. State which portion, if any, of work is guaranteed after completion and value of same $

17. State nature and amount of the work to be sub-let

18. Will sub-contractors be required to give corporate bonds?

19. What is the estimated cost of work (by Architect or Engineer)?

20. What is your estimate of the cost of work to you?

21. With what bank have you arranged a loan for the purpose of handling this contract?

22. What is the amount of such loan? $

23. When and how must you repay the loan?

24. What security, if any, has the bank required for the loan?

25. Have you assigned or will you assign your payments on this contract or any part thereof?

[illegible]

26. What additional plant do you need? .....

27. Have you made binding commitments for materials required for this contract? .....
With whom? (Enumerate largest ones.) .....

28. Have you applied to any other Company for this bond? .....Give name of Company
and if declined, state why .....

29. Give names of surety companies you have previously dealt with .....

30. Who is to maintain fire and tornado insurance during construction? .....

31. Have you arranged Employers' Liability or Workmen's Compensation and Public Liability insurance required by the contract? .....What company? .....
(Give names of companies, amount of each policy and date of expiration)

32. Are you having any controversy with anyone over any contract or payment of labor or material bills on any contract? .....

33. Are there any mechanics' liens filed on any of your work anywhere? .....

34. Are there any judgments against you? .....Have you ever failed in business? .....

Contracts On Hand

Enumerate contracts you have under way, giving present status of each and name of surety.

Name of Work and Name of Owner	Original Price	Payments thus far received	Money thus far retained	Date Contract will be completed	Name of Surety

(Applicants and not Agents must fill out this Agreement)

AGREEMENT OF INDEMNITY

The undersigned hereby declares that the statements contained in the foregoing application are true, and are made without reservation for the purpose of inducing the STANDARD ACCIDENT INSURANCE COMPANY to become surety on the bond or bonds herein applied for; and in consideration of the STANDARD ACCIDENT INSURANCE COMPANY becoming surety on the bond or bonds herein applied for, hereby covenants and agrees as follows: To pay in advance the initial premiums or fees herein agreed to; namely:

$ ....., if a Proposal Bond.

$ [illegible].00 A.F.A., if a Performance Bond.

$ n/c Byt., if a Maintenance Bond, for the Term.

$ ....., if a Miscellaneous Bond, per annum for the Term.

Initial premium payments are subject to renewal, correction and adjustment to conform to the published Tower rates and are to be made until the undersigned shall deliver to said company, at its home office in Detroit, Michigan, competent written evidence of its discharge from such suretyship, and from all liabilities by reason thereof.

In further consideration of its becoming surety as above, the undersigned does hereby covenant and agree to perform all the conditions of said bond, and any and all renewals and extensions thereof, to be performed, and will at all times indemnify and save the surety harmless from and against all loss, costs, damages, expenses and attorneys' fees whatsoever (including fees of special counsel whenever by the surety deemed necessary), and any and all liability thereby, sustained or incurred by the company by reason of executing said bond or bonds or any of them, in making any investigation on account thereof, in prosecuting or defending any action brought in connection therewith, in obtaining a release therefrom, and in enforcing any of the agreements herein contained, and will place the surety in funds to meet every such claim, demand, liability, cost, charge, counsel fees, expense, suit, order, judgment or subdivision against it by reason of such suretyship, and any and all renewals and extensions thereof, and before it shall be required to pay the same.

And for the better protection of said Company, the undersigned, as of the date hereof, hereby assigns, transfers and [illegible] to the said STANDARD ACCIDENT INSURANCE COMPANY, all right [illegible] and interest of

20. Give names of surety companies you have previously dealt with .....

.....

21. Who is to maintain fire and tornado insurance during construction? .....

22. Have you arranged Employers' Liability or Workmen's Compensation and Public Liability insurance required by the contract? ..... What company? .....
(Give names of companies, amount of each policy and date of expiration)

23. Are you having any controversy with anyone over any contract or payment of labor or material bills on any contract? .....

24. Are there any mechanics' liens filed on any of your work anywhere? .....

25. Are there any judgments against you? ..... Have you ever failed in business? .....

Contracts On Hand

Enumerate contracts you have under way, giving present status of each and name of surety.

Name of Work and Name of Owner	Original Price	Payments thus far received	Money thus far retained	Date Contract will be completed	Name of Surety

(Applicants and not Agents must fill out this Agreement)

AGREEMENT OF INDEMNITY

The undersigned hereby declares that the statements contained in the foregoing application are true, and are made without reservation for the purpose of inducing the STANDARD ACCIDENT INSURANCE COMPANY to become surety on the bond or bonds herein applied for; and in consideration of the STANDARD ACCIDENT INSURANCE COMPANY becoming surety on the bond or bonds herein applied for, hereby covenants and agrees as follows: To pay in advance the initial premiums or fees herein agreed to; namely:

$ ..... , if a Proposal Bond.

$ 1,200.00 in f., if a Performance Bond.

$ n/c fyt., if a Maintenance Bond, for the Term.

$ ..... , if a Miscellaneous Bond, per annum for the Term.

Initial premium payments are subject to renewal, correction and adjustment to conform to the published Tower rates and are to be made until the undersigned shall deliver to said company, at its home office in Detroit, Michigan, competent written evidence of its discharge from such suretyship, and from all liabilities by reason thereof.

In further consideration of its becoming surety as above, the undersigned does hereby covenant and agree to perform all the conditions of said bond, and any and all renewals and extensions thereof, to be performed, and will at all times indemnify and save the surety harmless from and against all loss, costs, damages, expenses and attorneys' fees whatsoever (including fees of special counsel wherever by the surety deemed necessary), and any and all liability therefor, sustained or incurred by the company by reason of executing said bond or bonds or any of them, in making any investigation on account thereof, in prosecuting or defending any action brought in connection therewith, in obtaining a release therefrom, and in enforcing any of the agreements herein contained, and will place the surety in funds to meet every such claim, demand, liability, cost, charge, counsel fees, expense, suit, order, judgment or adjudication against it by reason of such suretyship, and any and all renewals and extensions thereof, and before it shall be required to pay the same.

And for the better protection of said Company, the undersigned, as of the date hereof, hereby assigns, transfers and conveys to it, the said STANDARD ACCIDENT INSURANCE COMPANY, all right, title and interest of the undersigned is and to all the tools, plant, equipment and materials of every nature and description that may now or hereafter be upon said work, or in, on or about the site thereof, including as well all materials purchased for or chargeable to said contract which may now be in process of construction, or storage elsewhere, or in transportation to said site, hereby assigning and conveying also all rights of the undersigned in and to all sub-contracts, which have been or may hereafter be entered into, and the materials embraced therein, and authorizing and empowering said Company, its authorized agents or attorneys, to enter upon and take possession of said tools, plant, equipment, materials and sub-contracts, and enforce, use and enjoy such possession upon the following conditions, viz.: This assignment shall be in full force and effect, as of the date hereof, should the undersigned fail, refuse or be unable to

complete the said work in accordance with the terms of the contract covered by said bond, or in event of any default on the part of the undersigned under the said contract.

In further consideration of the execution of the said bond, the undersigned does hereby agree, as of this date, that the said STANDARD ACCIDENT INSURANCE COMPANY, shall as surety on said bond, be subrogated to all rights, privileges and properties of the undersigned as principal and otherwise in said contract, and does hereby assign, transfer and convey to said Company all the deferred payments and retained percentages, and any and all moneys and properties that may be due and payable at the time of such breach or default, or that may thereafter become due and payable to said undersigned on account of said contract, or on account of extra work and materials supplied in connection therewith, hereby agreeing that all such moneys, and the proceeds of such payments and properties, shall be the sole property of the said STANDARD ACCIDENT INSURANCE COMPANY, and to be by it credited upon any loss, cost, damage, charge and expense sustained, or incurred by it as above under its bond of suretyship.

That in the event said Company executes said bond or bonds with Co-Sureties, or re-insures any portion of said bond or bonds with Re-insuring Companies, the undersigned agree that all of the terms and conditions of this agreement shall apply and operate for the benefit of such Co-Sureties and such Re-insuring Companies, as their interest may appear.

The undersigned further agrees that in the event of any modification, amendment or extension by the Company of the bond herein applied for, or its assent to any such modification, amendment or extension thereof shall not in anywise affect the liability of the undersigned hereunder.

And the undersigned further agrees that the execution by the undersigned of any other instrument whether relative to the bond hereby applied for or to any other former or subsequent bond, shall not release said undersigned from liability under the foregoing covenants, unless such other instrument shall expressly stipulate that the undersigned shall be released from such liability.

It is further agreed that in the event of any default, failure or refusal on the part of the undersigned to perform the contract guaranteed by the said bond, the Surety may at the expense of the undersigned, enter into any new agreement or agreements, with any person, firm or corporation for the performance of the work covered by said contract, or may complete the same, or the Surety may assent to a reletting or completion of the same by the owner, or by some other person firm or corporation for the owner, and in any such event, at the expense and the risk of the said undersigned to guarantee or procure a guarantee for such completion; that in any such event, all vouchers or agreements for expenses or liabilities incurred by the Surety in good faith, in adjusting, settling, paying or assuming the loss or liabilities thus incurred, or in procuring a guarantee for the same and the loss incident to such risk as may be thus incurred by the Surety, and including attorney's fees and traveling expenses shall be accepted as conclusive evidence against the undersigned and undersigned's estate, successors, or assigns of the fact and extent of undersigned's liability to the Surety under and by virtue of said contract, and the bond herein applied for, and said loss or liability when so paid, adjusted, incurred or assumed, or the amount paid in order to effect the completion of the work, or an agreement for the completion of the same, or by reason of any such guaranty, shall give to the Surety an immediate right of action against the undersigned or the undersigned's estate to the extent of the same, whether the same shall have been actually paid or not.

In the event that the Company executes more than one bond upon which the undersigned is principal, any collateral placed with the Company by the undersigned; or any sums paid to the Company which the Company is entitled to receive on any one or more of the bonds, may be applied in the discretion of the Company, to any loss or losses sustained on any of the other bonds; and any collateral so placed with the Company may be held by the Company until all risk or liability on any or all of the bonds shall have terminated.

In the event that the Company is required by the State Insurance Department to reserve from its assets an amount to cover any contingent claim or claims under the bond herein applied for, by reason of default of the applicant, abandonment of contract, liens filed, dispute with the owner or obligee, or for any other reason whatsoever, the undersigned, jointly and severally, hereby covenants and agrees to immediately on demand, deposit with the Company, in current funds, an amount sufficient to cover such contingent claim or claims, as a trust fund or collateral security; to be held by the Company as indemnity on the bond herein applied for, in addition to the indemnity afforded by this instrument, and if the Company is required to enforce performance of this covenant by action at law or in equity, the costs, charges and expenses, including counsel or attorney's fees, which it may hereby incur, shall be included in such action and paid by the undersigned.

That the Company shall have the right at any and all reasonable times to ascertain from the bank or banks, or other depository, in which applicant deposits funds the amount standing to applicant's credit in such bank or banks, or other depository, also to have free access to books and records of applicant.

That the Surety shall, at its option, have and may exercise in the name of the undersigned, or otherwise, any right, or remedy, or demand which the undersigned may have, for the recovery of any sums paid by the Surety by virtue of its suretyship, and any and all extensions and renewals thereof, together with all other rights and remedies and demands which the undersigned has or may have in the premises, all of which rights and remedies and demands are hereby assigned to the Surety, with full power and authority to said Surety, in the name of the undersigned or otherwise, as it may be advised, and as attorney for said undersigned to do anything, which the undersigned might do, if personally present, if this instrument were not executed, and said undersigned hereby appoints said Surety attorney of the undersigned for such purpose.

That this agreement shall not, nor shall acceptance by the Surety of payment for its suretyship, nor agreement to accept, nor acceptance by it at any time of other security, nor assent by it to any act of the undersigned, or of any person acting on behalf of the undersigned in any way abridge, defer or limit its right to be subrogated to any right or remedy, nor limit or abridge any right or remedy which the Surety otherwise might or may have, acquire, exercise or enforce, nor create any liability on the part of the Surety which would not exist were this agreement not executed.

It is hereby further agreed by the undersigned that the vouchers or other evidence of any loss paid by said STANDARD ACCIDENT INSURANCE COMPANY, under the aforesaid obligation, together with vouchers or other evidence of payment of all costs and expenses whatever incurred by said STANDARD ACCIDENT INSURANCE COMPANY, adjusting said loss or in completing said contract shall be taken as conclusive evidence not only against the undersigned jointly and severally, but as well against the respective heirs, executors, administrators successors and assigns, of the fact and extent of liability under said obligation of the said STANDARD ACCIDENT INSURANCE COMPANY.

It is further agreed that a default within the meaning of this obligation shall be any failure upon the part of the undersigned to comply with the directions of the engineer or architect in charge to perform the work at the time and in the manner specified in said contract and in the event the bond herein mentioned guarantees the payment of labor and materials in connection with the work, the failure of the undersigned to pay said bills when they become

...to the said Surety applied for or to any other former or subsequent bond, shall not release said undersigned from liability under the foregoing covenants, unless such other instrument shall expressly stipulate that the undersigned shall be released from such liability.

It is further agreed that in the event of any default, failure or refusal on the part of the undersigned to perform the contract guaranteed by the said bond, the Surety may at the expense of the undersigned, enter into any new agreement or agreements, with any person, firm or corporation for the performance of the work covered by said contract, or may complete the same, or the Surety may assent to a reletting or completion of the same by the owner, or by some other person firm or corporation for the owner, and in any such event, at the expense and the risk of the said undersigned to guarantee or procure a guarantee for such completion; that in any such event, all vouchers or agreements for expenses or liabilities incurred by the Surety in good faith, in adjusting, settling, paying or assuming the loss or liabilities thus incurred, or in procuring a guarantee for the same and the loss incident to such risk as may be thus incurred by the Surety, and including attorney's fees and traveling expenses shall be accepted as conclusive evidence against the undersigned and undersigned's estate, successors, or assigns of the fact and extent of undersigned's liability to the Surety under and by virtue of said contract, and the bond herein applied for, and said loss or liability when so paid, adjusted, incurred or assumed, or the amount paid in order to effect the completion of the work, or an agreement for the completion of the same, or by reason of any such guaranty, shall give to the Surety an immediate right of action against the undersigned or the undersigned's estate to the extent of the same, whether the same shall have been actually paid or not.

In the event that the Company executes more than one bond upon which the undersigned is principal, any collateral placed with the Company by the undersigned; or any sums paid to the Company which the Company is entitled to receive on any one or more of the bonds, may be applied in the discretion of the Company, to any loss or losses sustained on any of the other bonds; and any collateral so placed with the Company may be held by the Company until all risk or liability on any or all of the bonds shall have terminated.

In the event that the Company is required by the State Insurance Department to reserve from its assets an amount to cover any contingent claim or claims under the bond herein applied for, by reason of default of the applicant, abandonment of contract, liens filed, dispute with the owner or obligee, or for any other reason whatsoever, the undersigned, jointly and severally, hereby covenants and agrees to immediately on demand, deposit with the Company, in current funds, an amount sufficient to cover such contingent claim or claims, as a trust fund or collateral security; to be held by the Company as indemnity on the bond herein applied for, in addition to the indemnity afforded by this instrument, and if the Company is required to enforce performance of this covenant by action at law or in equity, the costs, charges and expenses, including counsel or attorney's fees, which it may hereby incur, shall be included in such action and paid by the undersigned.

That the Company shall have the right at any and all reasonable times to ascertain from the bank or banks, or other depository, in which applicant deposits funds the amount standing to applicant's credit in such bank or banks, or other depository, also to have free access to books and records of applicant.

That the Surety shall, at its option, have and may exercise in the name of the undersigned, or otherwise, any right, or remedy, or demand which the undersigned may have, for the recovery of any sums paid by the Surety by virtue of its suretyship, and any and all extensions and renewals thereof, together with all other rights and remedies and demands which the undersigned has or may have in the premises, all of which rights and remedies and demands are hereby assigned to the Surety, with full power and authority to said Surety, in the name of the undersigned or otherwise, as it may be advised, and as attorney for said undersigned to do anything, which the undersigned might do, if personally present, if this instrument were not executed, and said undersigned hereby appoints said Surety attorney of the undersigned for such purpose.

That this agreement shall not, nor shall acceptance by the Surety of payment for its suretyship, nor agreement to accept, nor acceptance by it at any time of other security, nor assent by it to any act of the undersigned, or of any person acting on behalf of the undersigned in any way abridge, defer or limit its right to be subrogated to any right or remedy, nor limit or abridge any right or remedy which the Surety otherwise might or may have, acquire, exercise or enforce, nor create any liability on the part of the Surety which would not exist were this agreement not executed.

It is hereby further agreed by the undersigned that the vouchers or other evidence of any loss paid by said STANDARD ACCIDENT INSURANCE COMPANY, under the aforesaid obligation, together with vouchers or other evidence of payment of all costs and expenses whatever incurred by said STANDARD ACCIDENT INSURANCE COMPANY, adjusting said loss or in completing said contract shall be taken as conclusive evidence not only against the undersigned jointly and severally, but as well against the respective heirs, executors, administrators successors and assigns, of the fact and extent of liability under said obligation of the said STANDARD ACCIDENT INSURANCE COMPANY.

It is further agreed that a default within the meaning of this obligation shall be any failure upon the part of the undersigned to comply with the directions of the engineer or architect in charge to perform the work at the time and in the manner specified in said contract and in the event the bond herein mentioned guarantees the payment of labor and materials in connection with the work, the failure of the undersigned to pay said bills when they become due and payable shall be a default within the meaning hereof.

If the applicant is awarded the contract the applicant shall not be obligated to secure his "contract" bond from the Company nor shall the Company be obligated to sign such bond.

And it is further agreed that in the event of the STANDARD ACCIDENT INSURANCE COMPANY, executing the Bond for which this application is made, the undersigned will pay a fee of $5.00 and such expenses in excess thereof as the said Company may be put to in investigating this application or in connection therewith, in case the bond should not be delivered to the obligee.

OVER

These covenants shall be binding not only upon the undersigned, jointly and severally, but as well upon the respective heirs, executors, administrators, successors and assigns of the undersigned, and shall be liberally construed as against the undersigned and each of them whether signing as principal on said bond or as indemnitor to the said STANDARD ACCIDENT INSURANCE COMPANY.

Dated at Boston, Mass. this 2nd day of October 19 40

IF INDIVIDUAL sign here:

Witness ..... Applicant (Seal)

IF CO-PARTNERSHIP sign here:

Witness ..... Applicant

INDIVIDUAL SIGNATURES

..... Member of Firm (Seal)

..... Member of Firm (Seal)

..... Member of Firm (Seal)

IF CORPORATION sign here:

Witness ..... GRAVES-DUNN CORPORATION Applicant

By [signature] (Name of Corporation) ✓ President

By ..... Secretary (Seal)

Seal: 1921

Individual or Firm Acknowledgment

STATE OF .....
COUNTY OF ..... } ss.

On this ..... day of ..... 19 . before me personally appeared the within named

to me known and known to me to be the individual(s) described in and who executed the foregoing instrument, and acknowledged to me that executed the same.

Notary Public

Corporation Acknowledgment

STATE OF New York
COUNTY OF New York } ss.

On this 2nd day of October 19 40, before me personally came

[signature], who being by me duly sworn did depose and say: that he resides in Cranford, N.J.; that he is the Vice President of the GRAVES-DUNN CORPORATION

the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

[signature]
Notary Public

In consideration of the STANDARD ACCIDENT INSURANCE COMPANY executing the bond herein applied for, we jointly and severally join in the foregoing indemnity agreement.

Witness as to [signature] (Seal)

Witness as to [signature] (Seal)

Witness as to (Seal)

Note—If a co-partnership, firm name must be signed, also member individual seal above and signature of each member of firm. If corporation, corporate name must be signed in full with the officer's name and title as set below, duly attested and seal of the Company attested by the Secretary, and a corporate resolution giving that said officers are authorized to so sign shall accompany the application.

STATE OF New York
COUNTY OF New York } ss.

The foregoing indemnity agreement signed before me a Notary Public this 2nd day of October 19 40

[signature]
Notary Public

Nov 7th 1940 $50,000.00

Thirty after date, for value received [illegible] promise to pay

to the order of Ourselves

Fifty Thousand 00/100 Dollars

payable at [illegible]

Each and every party to this instrument, either as maker, endorser, surety or [illegible] notice and protest, and assents to any extension or postponement of the time of payment or other indulgence [illegible] exchange or release of collateral granted or permitted by the holder.

No.

C 81

Due

Signature [illegible]

Address [illegible]

[illegible]

November 15, 1940 $30,000

On demand after date, for value received, we promise to pay

to the order of Irving Trust [illegible]

Thirty thousand & no/100 [illegible] Dollars

payable at [illegible]

Each and every party to this instrument, either as maker, endorser, surety or otherw[illegible] [illegible] and protest, and consents to any extension or postponement of the time of payment or other indulgence and to a[illegible] [illegible] of collateral granted or permitted by the holder.

Signature [illegible] Corp

No.______ __________

C 33 Due Address [illegible]

NOV 28 1940

77a

Nov 16th 1940 $30,000.00

On Demand [illegible] We promise to pay

to the order of Irving Trust Co.

Thirty Thousand 00/100 Dollars

payable at Irving Trust Co. [illegible] New York, N.Y.

Each and every party to this instrument, either as maker, endorser, surety [illegible] hereby waives demand, notice and protest, and assents to any extension or postponement of the time of payment or other indulgence [illegible] exchange or release of collateral granted or permitted by the holder.

Signature Seavers-Quinn Corporation

No. ______ Due ______

C 33

NOV 28 1940

77b

Nov 20th 1940 $40,000.00

On Demand ~~after date~~, for value [illegible] promise to pay

to the order of Irving Trust Co

Forty Thousand 00/100 Dollars

payable at Irving Trust Co 100 East [illegible] New York N.Y.

Each and every party to this instrument, either as maker, endorser, surety or otherwise, [illegible] notice and protest, and assents to any extension or postponement of the time of payment or other indulgence and to any [illegible] release of collateral granted or permitted by the holder.

Signature Graves Quinn Corporation

Address W. J. Quinn Pres. Louis W. Graves

No. ________ ________ Due

C 81

Graves Quinn Corporation

Louis W. Graves Treas

W. J. Quinn Pres.

W. J. Quinn

Louis W. Graves

IRVING TRUST COMPANY

New York

DATE 11/28/40

PAYMENT HAS BEEN MADE ON YOUR LOAN AS FOLLOWS:

DATE	AMOUNT OF LOAN	DUE	RATE	INTEREST	PRINCIPAL PAID	WE CREDIT YOUR ACCOUNT
11/16/40	30,000.					
11/15/40	30,000.	DEMand	4½		$100,000.00	
11/20/40	40,000.					

Graves Quinn Corp

- [x] WE ACKNOWLEDGE RECEIPT OF YOUR CHECK #
- [ ] WE HAVE REDUCED YOUR NOTE AND LOAN
- [x] CANCELLED NOTE IS ATTACHED
- [ ] CANCELLED NOTE WILL ACCOMPANY YOUR VOUCHERS

Loan of $150,000- paid by your check for same amount.

1710/39

77d

IRVING TRUST COMPANY

New York

We credit your account

DATE 11/25/40

DESCRIPTION	AMOUNT
Refund of discount on your loan of $50,000. due 12/[redacted]0 11 days less 1 day for uncollected funds: (Above note enclosed.)	$62.50

TO Graves Quinn Corp
1723 Grand Central Terminal
N.Y.City N.Y.

Lincoln Office.

WW

[fol. 76] EXHIBITS SUBMITTED BY PLAINTIFF ON ARGUMENT

These exhibits were submitted by plaintiff on argument.

(Opposite)

[fol. 78] IN SUPREME COURT OF NEW YORK

OPINION

By Mr. Justice Collins

McKenzie (Graves-Quinn Corporation) v. Irving Trust Co.—Defendant moves to dismiss the first cause of action on the ground that the defenses thereto are sufficient as matter of law and founded upon facts established by documentary evidence or official record.

The first cause of action is by the trustee in bankruptcy of Graves-Quinn Corporation, to recover the sum of $150,000 as an alleged preferential payment, it being asserted that the preference was made within four months prior to the filing of the petition in bankruptcy.

The salient facts are not enmeshed in controversy. The bankrupt had a contract with the Government, payments under which were assigned to the defendant on November 20, 1940; on November 27, 1940, the Government issued and delivered to the bankrupt its check for $155,865.50. Bankrupt mailed the check to the defendant, and it was deposited in the bankrupt's general account. Thereafter, on November 28, 1940, the bankrupt issued to the defendant its check for $150,000 in payment of four notes theretofore executed. It was not until December 2, 1940, that the assignment was filed with the Government, and on December 5, 1940, the assignment was approved by the Secretary of War.

The question thus posed is whether the filing with and acceptance by the Government of the assignment was so essential to its validity and effectiveness as to date the preference therefrom. The defendant maintains that the assignment became effective on November 22, 1940, when the [fol. 79] instrument of assignment was delivered to defendant, and that the subsequent filing of the assignment with, and acceptance of it by, the Government related back to the time of the assignment. "The core of the assignment," argues the defendant, "was the instrument of assignment." In any event, defendant maintains that without the consent, the assignment creates at least an equity (Pickering v. Lomax, 145 U. S. 310). An equitable assignment, contends the defendant, is enough to sustain the transfer, citing Central Trust Co. v. West India Imp. Co. (169 N. Y. 314);

Okin v. Isaac Goldman Co. (79 F. (2d) 317), and cognate cases.

Prior to October 9, 1940, assignments of claims against the Government were absolutely void. Section 15 of Public Contracts U. S. Code, Annotated, R. S. 3737, provided: "No transfer of contract—No contract or order, or any interest therein shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States are concerned."

Revised Statute 3477, being section 203, Title 31, Money & Finance, U. S. Code, Annotated, provides: "All transfers and assignments made of any claim upon the United States * * * and all powers of attorney, orders, or other authorities for receiving payment of any such claim—shall be absolutely null and void, unless they are freely made—after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof."

However, on October 9, 1940, to enable contractors having contracts with the Government more easily to finance their projects, Public Law No. 811 of the 76th Congress, [fol. 80] both of the foregoing sections were amended by adding at the end of each section the following paragraphs: "The provisions of the preceding paragraph shall not apply in any case in which the moneys due or to become due from the United States or from any agency or department thereof, under a contract providing for payments aggregating $1,000 or more, are assigned to a bank, trust company, or other financing institution, including any Federal lending agency: Provided, 1. That in the case of any contract entered into prior to the date of approval of the Assignment of Claims Act of 1940, no claim shall be assigned without the consent of the head of the department or agency concerned. 2. That in the case of any contract entered into after the date of approval of the Assignment of Claims Act of 1940, no claim shall be assigned if it arises under a contract which forbids such assignment. 3. That unless otherwise expressly permitted by such contract any such assignment shall cover all amounts payable under such contract and not already paid, shall not be made to more than one party, and shall not be subject to further as-

signment, except that any such assignment may be made to one party as agent or trustee for two or more parties participating in such financing. 4. That in the event of any such assignment, the assignee thereof shall file written notice of the assignment together with a true copy of the instrument of assignment with—(a) The General Accounting Office, (b) The contracting officer or the head of his department or agency, (c) the surety or sureties upon the bond or bonds, if any, in connection with such contract, and (d) the disbursing officer, if any, designated in such [fol. 81] contract to make payment. Notwithstanding any law to the contrary governing the validity of assignments, any assignment pursuant to the Assignment of Claims Act of 1940 shall constitute a valid assignment for all purposes. Any contract entered into by the War Department or the Navy Department may provide that payments to an assignee of any claim arising under such contract shall not be subject to reduction or set-off, and if it is so provided in such contract, such payments shall not be subject to reduction or set-off for any indebtedness of the assignor to the United States arising independently of such contract. Sec. 2. This Act may be cited as the 'Assignment of Claims Act of 1940.' Approved, October 9, 1940."

The contract in suit was executed September 14, 1940, prior to the enactment of the amendment. The bankrupt did not comply with the above provisions until after payment. Yet until compliance therewith the assignment was null and void (National Bank of Commerce v. Downie, 218 U. S. 345). Nor was the assignment effective within the meaning of section 60a of the Bankruptcy Act as amended in 1938 until at least December 5, 1940.

No notice of this assignment was given to anybody prior to December 2. The defendant bank avows that "it was decided to refrain from filing the assignment immediately as it was feared such action might further delay issuance of the check."

I think the payment to the defendant without first filing and acceptance of the assignment within four months of bankruptcy constituted a preference (Collier on Bankruptcy, 14 ed., pp. 867-868, 892, 894, 896, 897).

At page 894 of Collier's, it is said: "The last sentence of [fol. 82] 60a, of the Act of 1938, properly construed, overrules much prior case law, particularly in reference to the

effect of lack of recording, and the doctrine of relation back as applied to possession taken under 'equitable liens and assignments.' "

And at page 897: "* * * To repeat a statement made in the preceding paragraph and strongly emphasized by Professor McLaughlin of Harvard this test is drawn so as to direct judicial investigation of the preferential character of a transfer to a time when such transfer has become, legally speaking, notorious or publicly known, and has lost many aspects of secrecy such as lack of recording or change of possession. As stated succinctly by Mr. Jacob Weinstein, one of the draftsmen of the 1938 Act, it relates to a point of time 'when the debtor has done everything required of him under applicable State Law in order to make the transfer so complete that it would be good against the whole world.' "

Here, not only did the statute require filing and consent, but, in addition, required notification of the assignment to be sent to the surety company.

In Re Quaker City Sheet Metal Company (129 Fed. (2d) 894) it was held that because no notice of the assignment was given the transfer must be deemed to have been made immediately before bankruptcy.

From what has been said it follows that the defendant's motion to dismiss the first cause of action must be and it is denied. Order signed.

[fols. 83-84] STIPULATION WAIVING CERTIFICATION

Pursuant to Section 170 of the Civil Practice Act, it is hereby stipulated that the papers as hereinbefore printed consist of true and correct copies of the notice of appeal to the Appellate Division, the order appealed from, the opinion of the Court, and all the papers upon which the Court below acted in making the said order appealed from, and the whole thereof, now on file in the office of the Clerk of the County of New York, and certification thereof by the Clerk pursuant to Section 616 of the Civil Practice Act is hereby waived.

Dated, New York, January 12, 1943.

Paul E. Mead, Attorney for Defendant-Appellant.
M. Carl Levine, Morgulas & Foreman, Attorneys for Plaintiff-Respondent.

[fol. 85] IN SUPREME COURT OF NEW YORK, COUNTY OF NEW YORK

[Title omitted]

NOTICE OF APPEAL TO THE COURT OF APPEALS

SIRS:

Please Take Notice that the plaintiff above named hereby appeals to the Court of Appeals of the State of New York from a judgment herein dated July 15th, 1943, and entered in the office of the Clerk of the County of New York on July 15th, 1943, which judgment dismissed the first cause of action contained in the complaint and was entered upon an order of the Appellate Division of the Supreme Court, First Department, dated July 2nd, 1943, reversing an order of summary judgment dismissing the said first cause of action, and which said order of the Appellate Division granted the said motion, and said judgment having been entered upon an order in the Supreme Court, New York County, severing the first cause of action from the balance of the action so that a separate and distinct judgment could be entered thereon.

Please Take Further Notice that this appeal is from each [fol. 86] and every part of the said judgment, and said order of the Appellate Division, First Department, as well as from the whole thereof.

Dated, New York, July 16th, 1943.

Yours, etc., M. Carl Levine, Morgulas & Foreman, Attorneys for Plaintiff, Office & P. O. Address, 521 Fifth Avenue, Borough of Manhattan, New York City.

To: Paul E. Mead, Esq., Attorney for Defendant, 1 Wall Street, New York City; Clerk of the County of New York; Clerk of the Court of Appeals of the State of New York.

[fol. 87] In Supreme Court of New York, County of New York

[Title omitted]

Order of Severance—July 10, 1943

On reading and filing the annexed stipulation dated July 9th, 1943,

Now, on motion of M. Carl Levine, Morgulas & Foreman, attorneys for the plaintiff herein, it is

Ordered, that the above entitled action be severed so that each of the two causes of action therein referred to may proceed as separate actions, and so that each of said causes of action may terminate in distinct, separate and appropriate judgments; and it is further

Ordered, that this order of severance shall be without prejudice to the rights of either of the parties herein in any [fol. 88] pending or future appeal from an order of the Appellate Division, Supreme Court, First Department, dated July 2nd, 1943, granting defendant's motion for summary judgment herein dismissing the first cause of action.

Enter, K. O'B., J. S. C.

In Supreme Court of New York, Appellate Division

Present: Hon. Francis Martin, Presiding Justice; Hon. Alfred H. Townley, Hon. Edward J. Glennon, Hon. Albert Cohn, Hon. Joseph M. Callahan, Justices.

13003

Albert E. McKenzie, as Trustee in Bankruptcy of Graves-Quinn Corporation, Respondent,

vs.

Irving Trust Company, Appellant

Order of Reversal—July 2, 1943

An appeal having been taken to this Court by the defendant from an order of the Supreme Court, New York County, [fol. 89] entered on the 5th day of December, 1942, denying defendant's motion to dismiss the first cause of action set forth in the complaint, and said appeal having been argued

by Mr. William Onderdonk, of counsel for the appellant, and by Mr. David Morgulas, of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered that the order so appealed from be and the same is hereby reversed upon questions of law with $20 costs and disbursements to the appellant and the motion granted.

Enter, F. M.

In Supreme Court of New York, New York County

Albert E. McKenzie, as Trustee in Bankruptcy of Graves-Quinn Corporation, Plaintiff,

against

Irving Trust Company, Defendant

Judgment of Reversal

The defendant above-named having made a motion to dismiss the first cause of action set forth in the complaint, and said motion coming on to be heard at Special Term, Part [fol. 90] III, of this court, on the 30th day of October, 1942, and the court having made an order denying the motion of defendant, and said order having been duly entered in this office on the 5th day of December, 1942, and defendant having appealed from said order, and the Appellate Division, First Department, having by order dated July 2, 1943, reversed said order and granted the motion to dismiss the first cause of action upon the merits, and this court by an order herein dated July 10, 1943, having severed the action so that each of the two causes of action set forth in the complaint shall proceed as separate actions and terminate in distinct separate and appropriate judgments,

Now, on motion of Paul E. Mead, attorney for defendant, it is

Adjudged that the first cause of action of the complaint be, and the same hereby is dismissed upon the merits, and that defendant Irving Trust Company do recover of plaintiff Albert E. McKenzie, as Trustee in bankruptcy of Graves-Quinn Corporation, the sum of $371.44 costs as taxed, and that defendant have execution therefor.

Dated, July 15, 1943.

Archibald R. Watson, Clerk.

Entered July 15, 1943. 10 H. 40 M.

[fol. 91] In Supreme Court of New York, Appellate Division—First Department, April, 1943

Francis Martin, P. J., Alfred H. Townley, Edward J. Glennon, Albert Cohn, Joseph M. Callahan, JJ.

13003

Albert E. McKenzie, as Trustee in Bankruptcy of Graves-Quinn Corporation, Respondent,

vs.

Irving Trust Company, Appellant

Appeal from an Order of the Supreme Court, New York County, Denying Defendant's Motion to Dismiss the First Cause of Action Set Forth in the Complaint

William A. Onderdonk, of counsel (Paul E. Mead, attorney), for appellant.

David Morgulas, of counsel (M. Carl Levine, Morgulas & Foreman, attorneys), for respondent.

Opinion

Cohn, J.:

Defendant Irving Trust Company appeals from an order denying its motion for summary judgment dismissing the [fol. 92] first cause of action set forth in the complaint.

In the cause of action challenged plaintiff, the trustee in bankruptcy of Graves-Quinn Corporation, seeks to recover a payment of $150,000 which was made by the bankrupt Graves-Quinn to defendant on November 28, 1940, exactly four months before the filing of a petition in bankruptcy, asserting that the payment was preferential by virtue of the provisions of Section 60-a of the Bankruptcy Act (11 U. S. C. A., sec. 96). Prior thereto and on November 22, 1940, defendant received from the Graves-Quinn Corporation a *bona fide* assignment of all moneys due or to become due from the United States Government by reason of the Government's contract with the Graves-Quinn Corporation.

The principal question involves the interpretation of Section 60-a of the Bankruptcy Act insofar as that statute affects an assignment of moneys to become due from the

United States on a construction contract and whether the four month period referred to in Section 60-a begins to run from the date of the delivery of the assignment or from the date of the filing of the assignment as required by an act of Congress dated October 9, 1940, amending the federal statutes dealing with the assignment of moneys due from the Federal Government. (Title 31, U. S. C. A., sec. 203.)

It is our view that the assignment was not inoperative because of the delay either in obtaining the consent of the Secretary of War thereto or in the filing of the assignment with the various government departments. (Amiesite Constr. Corp. v. Luciano Conr. Co., 284 N. Y. 223; Salem [fol. 93] Co. v. Manufacturers' Co., 264 U. S. 182.) The primary purpose of the Assignment of Claims Act (Title 31 U. S. C. A., § 203) is to give protection to the Government. (Martin v. National Surety Co., 300 U. S. 588.) The only infirmity in the assignment pending the consent and filing was the impairment of recourse of defendant to the government. Otherwise, the assignment was fully perfected. No other creditor of Graves-Quinn Corporation could have acquired any rights in the property so transfer-ed superior to the rights of the defendant by taking an assignment from the bankrupt after November 22, 1940, and by obtaining the War Department's consent to the assignment. (Salem Co. v. Manufacturers' Co., supra; Williams v. Ingersoll, 89 N. Y. 508; Superior Brassiere Co., Inc. v. Zimetbaum, 214 App. Div. 525.)

In Corn Exchange National Bank and Trust Co. v. Klander, 318 U. S. 434 (decided March 8, 1943), the court was considering assignments made in Pennsylvania where the law provided that, of two assignees of choses in action, the one first giving notice to the obligor had priority and it was held that, because of the failure of the assignees to give notice, a subsequent good faith assignee giving such notice would acquire a right superior to theirs. In holding the assignments inoperative against the trustee in bankruptcy, the court said:

> "This is undoubtedly the effect of a literal reading of the Act. Its apparent command is to test the effectiveness of a transfer, as against the trustee, *by the standards which applicable state law would enforce against a food-faith purchaser.* Only when such a pur- [fol. 94] chaser is precluded from obtaining superior

rights is the trustee so precluded. So long as the transaction is left open to possible intervening rights to such a purchaser, it is vulnerable to the intervening bankruptcy. By thus postponing the effective time of the transfer, the debt, which is effective when actually made, will be made antecedent to the delayed effective date of the transfer and therefore will be made a preferential transfer in law although in fact made concurrently with the advance of money. In this case the transfers, good between the parties, had never been perfected as against good-faith purchasers by notice to the debtors as the law required, and so the conclusion follows from this reading of the Act that the petitioners lose their security under the preference prohibition of section 60 (b)." (Emphasis ours.)

On the facts in this case, under the laws of this State, no purchaser in good faith could acquire on November 28, 1940, any right superior to the defendant. Hence, the payment of $150,000 made by the bankrupt to defendant on November 28th was not a preferential one. Plaintiff is accordingly entitled to judgment dismissing the first cause of action upon the merits.

The order should be reversed with $20 costs and disbursements and the motion to dismiss the first cause of action granted.

All Concur

[fol. 95] Stipulation Waiving Certification to Court of Appeals

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the foregoing are true and correct copies of the record on appeal to the Appellate Division of the Supreme Court for the First Department, the notice of appeal to the Court of Appeals, order of severance, the order of reversal, the judgment of reversal, and the opinion of the Appellate Division for the First Department, all of which papers are now on file in the office of the Clerk of the County of New York; and certification of all of the foregoing papers is hereby waived.

Dated, New York, December , 1943.

M. Carl Levine, Morgulas & Foreman, Attorneys for Plaintiff-Appellant; Paul E. Mead, Attorney for Defendant-Respondent.

[fol. 96] COURT OF APPEALS, THURSDAY, APRIL 13, 1944

ALBERT E. McKENZIE, as Trustee in Bankruptcy of Graves-Quinn Corporation, Appellant,

v.

IRVING TRUST COMPANY, Respondent

Decided April 13, 1944

Appeal from a judgment, entered July 15, 1943, upon an order of the Appellate Division of the Supreme Court in the first judicial department which (1) reversed on questions of law an order of a Special Term of the Supreme Court, New York County (Collins, J.) denying a motion by defendant for a dismissal of the first cause of action set forth in the complaint and (2) granted the motion. Following the making of said order of reversal by the Appellate Division, an order was made by Special Term (O'Brien, J.), on written stipulation, directing, among other things, a severance of the action so that each of the two causes of action might proceed as a separate action and terminate in a separate judgment.

David Morgulas for appellant.
William A. Onderdonk and *Paul E. Mead* for respondent.

LEHMAN, Ch. J.:

On March 28, 1941, a petition in bankruptcy was filed against Graves-Quinn Corporation and thereafter the corporation was duly adjudicated a bankrupt. On November 28, 1940, the defendant bank had received from the bankrupt its check for $150,000. The check had been mailed from Boston on November 27th. The deposit account of the bankrupt with the defendant bank was at that time overdrawn. It had borrowed large sums of money from the bank and had executed and delivered to the bank three promissory notes aggregating the sum of $150,000. On November 27, 1940, the bankrupt received a check for $155,865.50 from the United States Government in payment of construction work which the bankrupt was performing under a contract with the War Department. On the same evening the bankrupt mailed that check to the bank for deposit in the bankrupt's account, and also mailed to the bank

a second check in the sum of $150,000 drawn on its deposit account to the order of the bank. The bank received the checks on November 28th and used the bankrupt's check for $150,000 to pay and discharge three promissory notes of the bankrupt executed by the bankrupt when it borrowed that amount from the bank. After the adjudication in bankruptcy the trustee brought an action for the restitution of the moneys of the bankrupt which the bank had applied on November 28, 1940, to the payment of that indebtedness.

The first cause of action in the complaint alleges that such transfer of its moneys by the bankrupt in payment of an antecedent indebtedness operated as a preference which is unlawful under the provisions of the Bankruptcy Act (U. S. Code, tit. 11). The second cause of action alleges that the transfer was void because in violation of section 15 of the Stock Corporation Law of the State of New York. In its answer the defendant, in addition to denials of material allegations of the complaint, pleaded certain affirmative defenses to each cause of action and then moved pursuant to rule 113 of the Rules of Civil Practice for summary judgment dismissing the first cause of action on the ground that "the defenses thereto are sufficient as matter of law and founded upon facts established by documentary evidence or official record". The Appellate Division unanimously reversed an order of Special Term denying the motion and granted the motion to dismiss the first cause of action alleged in the complaint. An order of severance and a judgment dismissing the first cause of action was entered. Upon this appeal we are concerned only with that cause of action.

The alleged unlawful transfer on November 28th was made, it is said, exactly four months prior to the date of the petition in bankruptcy. Payment of an antecedent debt by a transfer of moneys, at that time belonging to the bankrupt, upon which the creditor had no lien and in which it had no special property would, it is plain, constitute an unlawful preference which could be set aside upon the suit of the trustee. That would not be true, however, if the payment of the antecedent debt was made from property of the debtor which had been transferred to the creditor at any time prior to November 28th, and the defendant has pleaded in its affirmative defenses and, upon the motion for summary judgment has established, facts which, it is contended, show a prior assignment by the debtor of the moneys which might thereafter be paid by the government for work performed

under the construction contract of the defendant and which show, also, that on and after November 27th, if not before, the "defendant had a lien and right of offset against the deposit balance of Graves-Quinn Corporation to the amount of $150,000." The Bankruptcy Act which in section 60 provides that a preferential transfer of property by an insolvent debtor in payment of an intecedent debt shall be void if made within four months of the filing of a petition in bankruptcy, by an amendment adopted in 1938 also formulates in section 60 (subd. a) the test which must be applied in determining the date when a transfer is complete. "A transfer shall be deemed to have been made at the time when it became so far perfected that no bona-fide purchaser from the debtor and no creditor could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee therein, and, if such transfer is not so perfected prior to the filing of the petition in bankruptcy * * * it shall be deemed to have been made immediately before bankruptcy." We apply that test here. The problem presented upon this appeal is whether a transfer so perfected that it can withstand that test was made on or before November 27th.

[fol. 97] The facts which may be relevant to that problem are not disputed. In September, 1940, Graves-Quinn Corporation, the bankrupt, entered into a contract with the War Department for the construction of military housing at several places in New England, for a stipulated consideration of approximately $1,000,000. In accordance with the terms of the contract, Standard Accident Insurance Company executed and delivered bonds for the performance of its contract by the bankrupt and for the payment by the bankrupt for labor and materials furnished to it. The bankrupt, in October and November, 1940, became indebted to the defendant for moneys which it borrowed from the defendant and for overdrafts made by the bankrupt upon its bank account. In accordance with an understanding or agreement it had with the defendant, the bankrupt from time to time applied upon this indebtedness moneys which were paid to the bankrupt by the government. On November 22, 1940, the bankrupt upon the demand of the defendant, delivered to it an assignment of "any and all sums of money now due or to become due" under its contract with the War Department.

In September, 1940, when the contract was made, assignments of moneys due or to become due from the United

States under contracts with the government, were expressly prohibited by statute: "All transfers and assignments made of any claim upon the United States. * * * and all powers of attorney, orders, or other authorities for receiving payment of any such claim—shall be absolutely null and void, unless they are freely made * * * after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. * * *" United States Code, title 31, Money and Finance, section 203 (Revised Statutes, 3477). The assignment delivered by the bankrupt on November 22, 1940, would undoubtedly have been "absolutely null and void" if the statute had not been amended on October 9, 1940, for the express purpose of authorizing subject to conditions therein specified, the assignment of claims against the United States arising even under contracts theretofore made with the government (Public Law No. 811 of the 76th Congress). The statute as amended provides that:

"The provisions of the preceding paragraph shall not apply in any case in which the moneys due or to become due from the United States or from any agency or department thereof, under a contract providing for payments aggregating $1,000 or more, are assigned to a bank, trust company, or other financing institution, including any Federal lending Agency: Provided,

"1. That in the case of any contract entered into prior to the date of approval of the Assignment of Claims Act of 1940, no claim shall be assigned without the consent of the head of the department or agency concerned;

"2. * * * * * * *

"3. * * * * * * *

"4. That in the event of any such assignment, the assignee thereof shall file written notice of the assignment together with a true copy of the instrument of assignment with—

"(a) the General Accounting Office,

"(b) the contracting officer or the head of his department or agency,

"(c) the surety or sureties upon the bond or bonds, if any, in connection with such contract, and

"(d) the disbursing officer, if any, designated in such contract to make payment.

"Notwithstanding any law to the contrary governing the validity of assignments, any assignment pursuant to the Assignment of Claims Act of 1940 shall constitute a valid assignment for all purposes."

The defendant bank did not request or receive the "consent of the head of the department or agency concerned" to the assignment executed on November 22nd until after November 28th, when it had obtained from the bankrupt and applied to the payment of the antecedent debts of the bankrupt, the proceeds of the check which the bankrupt had received from the United States; nor did it file written notice of the assignment until after that time as required in subdivision 4 of the amended statutes. It enclosed the assignment in a letter addressed to the Quartermaster General in Washington dated November 27, 1940, in which for the first time it "requested the approval of the Head of the Department concerned" and stated that it "should appreciate your cooperation in obtaining this approval." Accordingly on December 4th the assignment was transmitted by the office of the Quartermaster General to the Assistant Secretary of War with a memorandum stating among other things: "2. It is the opinion of this office that the attached assignment has been executed pursuant to and in accordance with the Assignment of Claims Act of 1940 and, therefore, constitutes a valid assignment. 3. It is recommended that the attached assignment be approved by you in accordance with the provisions of subdivision 1 of the Assignment of Claims Act of 1940." The following day, December 5, 1940, the Secretary of War formally approved the assignment. In the meanwhile on December 2, 1940, the defendant had sent written notices of the assignment to the surety company and the other persons with whom such written notices must be filed in accordance with subdivision 4 of the amended statute. Thus it appears undisputed that on December 5th there was full compliance with every condition provided by the statute in connection with the assignment of claims against the United States; but since such compliance was completed within four months of the filing of the petition of bankruptcy the question arises whether the assign-

ment constitutes a transfer which was "perfected" within the meaning of the Bankruptcy Act when executed or only when there was compliance with all the conditions provided in the Assignment of Claims Act.

The right to assign a debt or claim arising under a contract with the United States may be granted or withheld by Congress and the power of Congress to attach such conditions as it sees fit to the grant of a right to assign is not open to serious challenge. Here it has granted a right to assign; there has been compliance with the statutory conditions and the United States does not challenge the validity of the assignment. We are told that Congress attached conditions to the right to assign a claim against the United States primarily for the protection of the government and that it "was not inoperative because of the delay either in obtaining the consent of the Secretary of War thereto or in the filing of the assignment with the various government departments" (266 App. Div. 599, 601) citing *Amicsite Constr. Corp.* v. *Luciano Contr. Co.* (284 N. Y. 223); *Salem Co.* v. *Manufacturers' Co.* (264 U. S. 182).

Congress, by its amendment to the Assignment of Claims Act, sanctioned the assignment of claims against the United States subject to the specified conditions for the purpose of enabling contractors to borrow money for the performance of the work upon the assurance that moneys received in payment for the work would be used to satisfy the debt. That appears plain upon the face of the statute and is confirmed by the debate in Congress. It is not so plain that the conditions that the consent of the head of the department be obtained and that the assignment be filed in government offices were attached to the right to assign solely for the protection of the government. The debates in Congress suggest additional reasons. The Chairman of the Judiciary Committee of the House of Representatives explained: "If this bill is not enacted there can be no assignment of claims. That is the first proposition. The agencies of the Government which have responsibility are themselves responsible for proposing this legislation. They came down to the Committee on the Judiciary, * * * and indicated their desire to increase as far as possible the number of persons who could bid on these contracts, and who could help the Government in this emergency. They said, however, with reference particularly to some of the equipment material, with regard to which secrecy had to

be preserved, that they did not want to take the responsibility of advising that in every case these claims should be assignable, or that there would not be in the nature of things some claims that should not be assigned." (Congressional Record, vol. 86, Part ii, p. 12557.)

We think that consent was required by Congress, not only for the protection of the government but also for the protection of the public from harm which might arise from assignment of some contracts with the War Department, the Navy Department or other departments of the government. To afford such protection in the fullest measure, we think that Congress may well have intended that an assignment of a claim for moneys due or to become due under a contract with the United States should be absolutely void *unless* consent was given, and should be "inoperative" *until* such consent was given. The question is now posed whether compliance with the statutory conditions, required to give force to the inchoate assignment of a claim, has retroactive effect for any purpose, or whether even after the assignment has become fully valid and enforcible it may be given effect only as if executed at the time when all statutory conditions were fulfilled. That is a question which depends solely upon the construction of a statute of Congress, and we are told that the question has not yet been considered or decided by any Federal court.

Congress, in attaching conditions to the contractors' right to assign claims against the United States, had, it is plain, no intention to dictate to the contractor what he should do with the moneys received upon his contract. *Hobbs* v. *McLean*, 117 U. S. 567.) After the contractor has fully complied with the conditions attached to his right to assign, the purpose of imposing any limitation upon the contractor's freedom to assign claims is fulfilled, and the government and the public have received the intended protection and have no interest in any controversy between successive assignees of the fund or claim or between persons asserting conflicting liens at law or in equity in the fund. It has been held that even where the statute provides that a transfer or assignment of a claim against the United States "shall be absolutely null and void" unless executed with prescribed formalities after "the issuing of a warrant for the payment thereof", an assignment which is for that reason "void" may still give rise to equities, and after the moneys are "in the hands of the contractor or subsequent

payees with notice, assignments may be heeded, at all events in equity, if they will not frustrate the ends to which the prohibition was directed." (*Martin* v. *National Surety Co.*, 300 U. S. 588, 596.) Though the analogies may not be complete, what was said and decided in that case may guide us in seeking the intent of the statute enacted after that case was decided.

Here the statute does not in express terms declare that an assignment is wholly void until the assignment has been filed and consent has been given. On the contrary, under the statute the assignment is permitted, *provided* that there is compliance with these conditions. Not only have the government and the public no interest in refusing all retroactive effect to such compliance, but the purpose of the government in sanctioning assignments to financial institutions, subject to specified conditions, might be thwarted in part if a lender who receives an executed assignment as security for a loan did not have the assurance that it thereby acquired an inchoate interest in the fund which would become enforcible when he complied with the statutory conditions. A consent which gives validity to an assignment previously executed, like the ratification of a contract made without prior authorization, cannot wipe out property rights acquired by third parties in the interval between the execution of the assignment and the consent without which it lacks validity. We think that at least as between the parties to the assignment, the assignment, however, effects an inchoate transfer of the assigned rights or property even though there must thereafter be compliance with statutory conditions before the assignment becomes enforcible.

That brings us to the question whether prior to November 28, 1940, the assignment of the moneys due or to become due under the contract was "perfected" within the meaning of section 60, subdivision (a) of the Bankruptcy Act [U. S. Code, tit. 11, § 96, subd. (a)], even though consent was not given until later. The test under the statute as amended in 1938 is, as I have said, whether no "*bona fide* purchaser from the debtor and no creditor could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee therein". The "standards which applicable state law would enforce against a good-faith purchaser" or against a creditor must be applied here. (*Corn Exchange Bank* v. *Klauder*, 318 U. S. 434.)

The test of what constitutes a perfected transfer formulated in section 60, subdivision a, is not the test previously applied. It is "more comprehensive and accords with the contemplated purpose of striking down secret liens. * * *" (House Reports, No. 1409, 75th Congress, First Session, p. 30. See *Corn Exchange Bank* v. *Klauder*, *supra*.) The appellant, however, fails to point out any rule of law whereby a *bona fide* purchaser for value or a creditor could have any rights in the moneys which might become due under the contract before they were paid to the contractor or its assignee, except perhaps a lienor under the provisions of the Lien Law of this State. It is unnecessary to decide whether the word "creditor" in the Bankruptcy Act was intended to include a lienor who complied with the statute, or whether a purchaser for value or a creditor could have obtained any rights in the moneys until they were paid to the contractor and the check mailed to the defendant on November 27th. It seems clear that at least from that time the transfer was perfected.

Certainly when the contractor received payment by check from the government on November 27th it was in good faith bound to deliver the check or its proceeds to the defendant in accordance with its agreement as evidenced by the executed assignment. The contractor had received a direction from the bank that the check should be mailed to it, and from the time that the check was deposited in the mail in accordance with that request, delivery of the moneys to the assignee was complete. The book entries of the bank on November 28th by which the check received by the contractor from the government was deposited in the account of the contract and the check of the contractor to the order of the bank in payment of indebtedness to the bank, merely constituted a record of the transaction in compliance with the directions of the contractor.

The appellant maintains, finally, that if an assignment of claims against the United States may be given effect without compliance with the statutory conditions, the surety company had received a prior assignment of the same moneys and therefore had rights superior to the rights of the defendant as subsequent assignee. Many objections are pointed out by the respondent to that contention of the plaintiff-appellant. We do not consider these objections, for the action is not brought by the plaintiff as trustee to establish that the surety company has a title superior to the title

of the bank. The action is brought solely to set aside the transfer to the bank as an unlawful preference. The trustee in bankruptcy has no authority to bring an action to establish a superior title in some other person.

The judgment should be affirmed, with costs.

Loughran, Rippey, Lewis, Conway, Desmond and Thacher, JJ., concur.

Judgment affirmed.

[fol. 99] Court of Appeals,
State of New York, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 13th day of April, in the year of our Lord one thousand nine hundred and forty-four, before the Judges of said Court.

Witness, The Hon. Irving Lehman, Chief Judge, Presiding, John Ludden, Clerk.

Remittitur, April 14, 1944.

[fol. 99a] Albert E. McKenzie, as Trustee in Bankruptcy of Graves-Quinn Corporation, Appellant,

ag'st

Irving Trust Company, Respondent

Be it Remembered, That on the 19th day of February in the year of our Lord one thousand nine hundred and forty-four, Albert E. McKenzie, as trustee in bankruptcy, &c., the appellant in this cause, came here unto the Court of Appeals, by M. Carl Levine, Morgulas & Foreman, his attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment and order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Irving Trust Company, the respondent in said cause, afterwards appeared in said Court of Appeals by Paul E. Mead, its attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

[fol. 100] Whereupon, The said Court of Appeals having heard this cause argued by Mr. David Morgulas, of counsel for the appellant, and by Mr. William A. Onderdonk of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the

Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

[fol. 100a] Therefore, it is considered that the said judgment be affirmed with costs as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals, remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

John Ludden, Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office,
Albany, April 14, 1944:

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

John Ludden, Clerk. (Seal.)

[fol. 101] At a Special Term, Part II of the Supreme Court, held in and for the County of New York, at the County Courthouse, Borough of Manhattan, City of New York, on the 18 day of April, 1944.

Present: Hon. Aaron J. Levy, Justice.

Index #7149/1942

Albert E. McKenzie, as Trustee in Bankruptcy of Graves-Quinn Corporation, Plaintiff,

against

Irving Trust Company, Defendant

The above mentioned plaintiff having appealed to the Court of Appeals from the judgment of the Appellate Division of this Court, First Department, entered on the 15th

day of July, 1943, in the office of the Clerk of New York County, and the Court of Appeals having heard said appeal and ordered and adjudged that the judgment so appealed from be affirmed, and judgment entered for the defendant with costs, and the remittitur from the Court of Appeals having been filed in the office of the Clerk of New York County,

Now, on motion of Paul E. Mead, attorney for defendant, it is

Ordered that the said judgment of the Court of Appeals be and the same hereby is made the judgment of this Court.

Enter,

A. J. L., J. S. C.

Filed, Apr. 19, 1944. New York County Clerk's Office.

[fol. 102] Sir:

Please to take notice that the within is a copy of an order this day duly made and entered herein in the office of the Clerk of New York County.

Dated, N. Y., April 17, 1944.

Yours, &c., Paul E. Mead, Attorney for Defendant, One Wall Street, Borough of Manhattan, New York City.

To M. Carl Levine M. & F. Esq., Attorneys for Plaintiff.

[Endorsed:] File No. 7149. Year 1942. Supreme Court: New York County. Albert E. McKenzie, as Trustee, etc., Plaintiff, against Irving Trust Company, Defendant. Order for Judgment. Paul E. Mead, Attorney for Defendant, One Wall Street, Borough of Manhattan, New York City. To M. Carl Levine, Morgulas & Foreman, Esqs., Attorneys for Plaintiff.

[Stamp:] Copy Received Apr. 20, 1944. M. Carl Levine, Morgulas & Foreman, Attorneys for ——.

[fol. 103] SUPREME COURT, NEW YORK COUNTY

Index #7149/1942

ALBERT E. McKENZIE, as Trustee in Bankruptcy of Graves-Quinn Corporation, 521 Fifth Avenue, New York City, Plaintiff,

against

IRVING TRUST COMPANY, 1 Wall Street, New York City, Defendant

The above named plaintiff having appealed to the Court of Appeals from the judgment of the Appellate Division of this Court, First Department, entered in this action on the 15th day of July, 1943, and from an order of the Appellate Division entered on the 2nd day of July, 1943, reversing the order herein entered on the 4th day of December, 1942, in the office of the Clerk of New York County, and the Court of Appeals having heard said appeal and ordered and adjudged that the judgment so appealed from be affirmed and judgment rendered for defendant with costs, and the remittitur from the Court of Appeals having been filed in the office of the Clerk of New York County, and an order having been entered thereon making the judgment of the Court of Appeals the judgment of this Court,

Now, on motion of Paul E. Mead, attorney for defendant, it is

Adjudged that the judgment in this action, entered on the 15th day of July, 1943, be and the same hereby is affirmed, and that defendant Irving Trust Company recover of plaintiff Albert E. McKenzie, as Trustee in Bankruptcy of Graves-Quinn Corporation the sum of $206.44, the amount of its costs herein as taxed, and that defendant have execution therefor.

Dated: April 19th, 1944.

Archibald R. Watson, Clerk. (Seal.)

[fol. 104] Sir:

Please to take notice that the within is a copy of a Judgment this day duly made and entered herein in the office of the Clerk of New York County.

Dated, N. Y., April 19, 1944.

Yours, &c., Paul E. Mead, Attorney for Defendant, One Wall Street, Borough of Manhattan, New York City.

To M. Carl Levine, M. & F., Esq., Attorneys for plaintiff.

[Endorsed:] File No. 7149. Year 1942. Supreme Court, New York County. Albert E. McKenzie, as Trustee, etc., Plaintiff, against Irving Trust Company, Defendant. Judgment. Paul E. Mead, Attorney for Defendant, One Wall Street, Borough of Manhattan, New York City. To M. Carl Levine, Morgulas & Foreman, Esqs., Attorneys for Plaintiff.

[Stamp:] Copy Received Apr. 20, 1944. M. Carl Levine, Morgulas & Foreman, Attorneys for ——.

[fol. 105] Clerk's Certificate

State of New York,
County of New York, ss:

I, Archibald R. Watson, Clerk of the Supreme Court in and for the said County and Clerk of the Supreme Court of said State, Do Hereby Certify that the foregoing consists of a copy of the Record on Appeal to the Court of Appeals, State of New York, the Remittitur dated April 14, 1944, of the Court of Appeals, State of New York, the Order on Remittitur dated April 18, 1944, and the Judgment on Remittitur dated April 19, 1944, all on file in my office.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, this 14th day of June, A. D., 1944.

Archibald R. Watson, Clerk. (Seal.)

[fol. 110] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1944

The petition herein for a writ of certiorari to the Court of Appeals of the State of New York is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: Enter M. Carl Levine File No. 48,641 New York, Court of Appeals, Term No. 188. Albert E. McKenzie, as Trustee in Bankruptcy of Graves-Quinn Corporation, Petitioner, vs. Irving Trust Company. Petition for a writ of certiorari and exhibit thereto. Filed June 23, 1944. Term No. 188 O. T. 1944.